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No. 11533

2625

United States
Circuit Court of Appeals
For the Ninth Circuit.

STEPHEN SORRENTINO, also known as
VINCENT SORRENTINO,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WALTER H. DUANE,
790 Mills Bldg.,
San Francisco,
Attorney for Appellant.

FRANK J. HENNESSY,
United States Attorney,

JAMES T. DAVIS,
Assistant United States Attorney,
Attorneys for Appellee.

In the Southern Division of the United States
District Court for the Northern Division
of California

No. 30317-G

UNITED STATES OF AMERICA

vs.

VINCENT SORRENTINO

INDICTMENT

First Count

(Harrison Narcotic Act, 26 U.S.C. 2553 and 2557)

The grand jury charges:

That Vincent Sorrentino, on or about the 16th day of August, 1945, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium.

Second Count

(Jones-Miller Act, 21 U.S.C. 174)

The grand jury further charges:

That at the time and place mentioned in the first count of this indictment, said defendant fraudulently and knowingly did conceal and facilitate the

concealment of said lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium, and the said smoking opium had been imported into the United States [1*] of America contrary to law as said defendant then and there knew.

A true bill.

HAROLD C. CLOUDMAN,
Foreman.

/s/ FRANK J. HENNESSY,
United States Attorney.

(Approved as to Form: R. B. McM.)

[Endorsed]: Filed June 19, 1946. [2]

[Title of District Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 28th day of June, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

ARRAIGNMENT

This case came on regularly this day for arraignment. The defendant Stephen Sorrentino was present with his attorney, Walter Duane, Esq. E. H.

* Page numbering appearing at foot of page of original certified Transcript of Record.

Henes, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Henes, the defendant was called for arraignment. The defendant was informed of the return of the Indictment by the United States Grand Jury, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, thereupon Mr. Duane waived the reading of the Indictment.

On motion of Mr. Duane and with consent of Mr. Henes, it is ordered that this case be continued to July 15, 1946, to plead. [3]

[Title of District Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 23rd day of July, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

PLEA

This case came on regularly this day for entry of plea. The defendant, Stephen Sorrentino, was present with his attorney, Walter Duane, Esq. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon

said defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

After hearing the attorneys, it is ordered that this case be continued to September 11, 1946, for trial. (Jury.) [4]

[Title of District Court and Cause.]

**MOTION FOR THE RETURN OF SEIZED
PROPERTY AND THE SUPPRESSION
OF EVIDENCE**

Stephen Sorrentino, named in the above entitled action as Vincent Sorrentino, hereby moves this Court to direct that certain property of which he is the owner, a schedule of which is annexed hereto, and which on the 21st day of June, 1946, at the premises known as 2619 38th Avenue in the City and County of San Francisco, State of California, and within the District of the above entitled Court, was unlawfully seized and taken from him by the deputies of the United States Marshal for this District, as well as certain Federal narcotic agents, all of whose true names are unknown to petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

That petitioner further states that the property was seized against his will and without his consent and without a search warrant.

WALTER H. DUANE,
Attorney for Petitioner. [5]

SCHEDULE OF PROPERTY SEIZED

1940 Pontiac six coupe, Engine No. 6-604828.
Receipt of Service.

[Endorsed]: Filed Aug. 1, 1946. [6]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR THE RETURN OF
SEIZED PROPERTY AND THE SUP-
PRESSION OF EVIDENCE.

To Frank J. Hennessy, Esq., United States Attor-
ney for the Northern District of California:

You will please take notice that the defendant above named will on Wednesday, August 14, 1946, at the hour of 10:00 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, move the above entitled Court for an order directing the return of property taken from the defendant and for the suppression of evidence.

Said motion will be made under Rule 41 of this Court and will be based upon all of the records, papers and files in the above entitled cause and upon oral testimony.

WALTER H. DUANE,
Attorney for Defendant.

Receipt of Service.

[Endorsed]: Filed Aug. 1, 1946. [7]

[Title of District Court and Cause.]

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 14th day of August, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

**ORDER DENYING MOTION FOR RETURN
OF PROPERTY AND TO SUPPRESS EVIDENCE.**

This case came on regularly this day for hearing of motion for return of property and to suppress evidence. The defendant was present in Court. After hearing Walter Duane, Esq., attorney for defendant, and James T. Davis, Esq., Assistant United States Attorney, it is ordered that said motion for return of property and to suppress evidence herein be and the same is hereby denied. [8]

[Title of District Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 14th day of January, in the year of our

Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

MINUTES OF TRIAL

This case came on regularly this day for trial. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant, Stephen Sorrentino, was present in Court with his attorney, Walter Duane, Esq. Thereupon the following persons, viz: Eulita D. Hogle, Mrs. Allen O. Newman, Giuseppe S. Giacomini, Florence Haller, Judson E. Bardwell, William Peoples, George O. Smith, William T. Campbell, Helen MacIntosh, Theodore B. Byran, Marjorie Grabhorn, Percy E. Herrill, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made an opening statement to the Court and jury on behalf of the United States. R. F. Love, William H. Grady and Jacob Lieberman were sworn and testified on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibit No. 1. Mr. Duane introduced Defendant's Exhibit A, which was marked for identification [9] purposes. The United States thereupon rested.

Mr. Duane made a statement to the Court and jury on behalf of the defendant. Josephine Priest, Bernard A. Reichling, Georgia Beckwith and Ward

Frederick Beckwith were sworn and testified on behalf of defendant.

The hour of adjournment having arrived, it is Ordered that the further trial of this case be continued to January 15, 1947, at 10 o'clock a. m. [10]

[Title of District Court and Cause.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 15th day of January, in the year of our Lord one thousand nine hundred and forty-seven.

MINUTES OF TRIAL; SENTENCE

Present: The Honorable Louis E. Goodman,
District Judge.

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. Isadore Cherney and Stephen Sorrentino were sworn and testified on behalf of the defendant. Mr. Duane offered Defendant's Exhibit B, which was marked for identification purposes only. The defense thereupon rested. Thomas E. Maguire was sworn and testified as a rebuttal witness on behalf of the United States. Both sides thereupon rested. After hearing the arguments of the attorneys and the instructions of

the Court, the jury retired at 3:35 p. m. to deliberate upon its verdict. At 4:55 p. m. the jury returned to the Courtroom for further instructions and again retired for further deliberations, at 5:15 p. m. At 6:30 p. m. the Court ordered that the United States Marshal take the jury and two (2) Deputy Marshals to supper, and thereupon the jury [11] and Deputy Marshals went to supper and returned at 8:00 p. m. and resumed its deliberations. At 8:25 p. m. the jury returned into Court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict which was ordered recorded, viz:

“We, the jury, find Stephen Sorrentino, the defendant at the bar, guilty as to Count One of the Indictment, guilty as to Count Two of the Indictment.

GEO. O. SMITH,
Foreman.”

The jury upon being asked if the said verdict as read was its verdict as recorded is the verdict of the jury, each juror upon being being polled replied that it was. Ordered that the jury be excused from the further consideration hereof and that the jurors be excused until notified to report. Mr. Duane, attorney for defendant, made a motion for a new trial and a motion in arrest of judgment, which motions were ordered denied.

The defendant was then called for judgment. After hearing the defendant and the attorneys, and

the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant Stephen Sorrentino is guilty as charged and convicted.

It is adjudged that the defendant Stephen Sorrentino, for the offense of which he stands convicted on the verdict of the jury of guilty as to Counts One and Two of the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count One of the Indictment; and ten (10) years and pay a fine to the United States of America [12] in the sum of one thousand (\$1,000.00) dollars on Count Two of the Indictment.

It is further ordered that the terms of imprisonment imposed on Counts One and Two of the Indictment run concurrently.

Ordered that judgment be entered herein accordingly.

It is further ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to an institution of the Penitentiary type. [13]

[Title of District Court and Cause.]

We, the Jury, find Stephen Sorrentino, the defendant at the bar, guilty as to Count One of the Indictment. Guilty as to Count Two of the Indictment.

GEO. O. SMITH,
Foreman.

[Endorsed]: Filed at 8 o'clock and 25 Min.
p. m., Jan. 15, 1947. [14]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes the defendant, Vincent Sorrentino, in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting him and granting him a new trial on the indictment herein, for the following, and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;
2. That the verdict is not supported by the evidence in the cause;
3. That the evidence adduced at the trial is insufficient to justify said verdict;
4. That the verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by the defendant.

This motion is made upon the minutes of the Court and upon all records and proceedings in said action and upon all of the testimony and evidence introduced at the trial.

Dated: January 15th, 1947.

WALTER H. DUANE,
Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1947. [15]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Now comes Vincent Sorrentino, the defendant in the above entitled action, against whom a verdict of guilty was rendered on the 15th day of January, 1947, in the above entitled cause, and moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him.

1. That the indictment and each Count thereof does not state facts sufficient to constitute a public offense under the laws of the United States;

2. That the evidence is not sufficient to support the verdict;

3. That the verdict of the jury is contrary to law.

Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court and the defendant prays that this motion be sustained and the judgment of conviction against him be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

Dated: January 15th, 1947.

WALTER H. DUANE,
Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1947. [16]

District Court of the United States for the
Northern District of California
Southern Division

No. 30317-G

UNITED STATES OF AMERICA

vs.

STEPHEN SORRENTINO

JUDGMENT AND COMMITMENT

On this 15th day of January, 1947, came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation of Harrison Narcotic Act, 26 USC., Secs. 2553 & 2557; & Jones-Miller Act, 21 USC., Sec. 174; defendant did, on or about August 16, 1945, in San Francisco (Ct. 1), unlawfully sell, dispense and distribute smoking opium, (Ct. 2) defendant did, at above time and place, fraudulently conceal and facilitate the concealment of smoking opium, as charged in Cts. 1 & 2 of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count One on the Indictment; and ten (10) years and pay a fine to the United States of America in the sum of one thousand dollars (\$1,000.00) on Count Two of the Indictment.

It is further ordered that the terms of imprisonment imposed in Counts One and Two of the Indictment commence and run concurrently.

Entered in Vol. 37 Judg. and Decrees at page 655.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LOUIS E. GOODMAN,
Judge.

Examined by:

JAMES D. DAVIS,
Asst. U. S. Attorney.

The Court recommends commitment to institution of penitentiary type.

Filed and entered this 15th day of January, 1947.

C. W. CALBREATH,
Clerk,

L. R. ELKINGTON,
Deputy Clerk. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Vincent Sorrentino, 2619 38th Avenue, San Francisco, California.

Name and address of appellant's attorney: Walter H. Duane, 790 Mills Building, 220 Montgomery Street, San Francisco 4, California.

Offense: Violation of Harrison Narcotic Act, 26 U.S.C. 2553 and 2557 in the First Count of the Indictment; violation of Jones-Miller Act, 21 U.S.C. 174 in the Second Count of the Indictment.

After trial by jury a verdict was returned finding the defendant guilty on both counts of said indictment on the 15th day of January, 1947.

That thereupon, on the said 15th day of January, 1947, defendant made a motion for a new trial which motion was denied, and thereupon made a motion in arrest of judgment which motion was denied, and the Court thereupon made its judgment and sentenced the defendant as follows:

Five years on the First Count,

Ten years on the Second Count,

Fined \$1,000.00 on the Second Count.

The sentences in the First Count and Second Count to be served concurrently; the total sentence being ten years imprisonment and a fine of \$1,000.00. [18]

Name of prison where now confined: County Jail of the City and County of San Francisco.

That defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

Dated: January 22nd, 1947.

WALTER H. DUANE,
Attorney for Defendant.

Receipt of Service.

[Endorsed]: Filed Jan. 22, 1947. [19]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 19 pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause of United States of America vs. Stephen Sorrentino, No. 30317-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of nine dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of February, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ E. H. NORMAN,
Deputy Clerk. [20]

In the Southern Division of the United States
District Court for the Northern District
of California

Before: Hon. Louis E. Goodman, Judge.

No. 30,317-G

UNITED STATES OF AMERICA

vs.

STEPHEN SORRENTINO,

Defendant.

REPORTER'S TRANSCRIPT

Tuesday, January 14, 1947

Counsel Appearing:

For the United States: James T. Davis, Esq.,
Assistant United States Attorney.

For the defendant: Walter H. Duane, Esq.

(A jury having been impaneled and sworn

to try the above-entitled cause, the opening statement by the United States Attorney having been made, the following proceedings were had):

R. F. LOVE

called as a witness on behalf of the Government;
sworn.

The Clerk: Will you state your name?

A. R. F. Love. [1*]

Direct Examination

Mr. Davis: Q. Doctor Love, what is your occupation?

A. Chemist, Internal Revenue Bureau.

Q. How long have you been engaged in that occupation? A. Twenty-eight years.

Q. As part of your official duties, is it necessary for you at times to perform tests upon various substances submitted to you for the purpose of determining whether or not the substances are narcotics?

A. It is, yes.

Mr. Davis: May I have this can marked for identification?

(The can was marked U. S. Exhibit 1 for Identification.)

Mr. Davis: Q. Doctor Love, I will show you Government's Exhibit No. 1 for Identification, and ask you if you have ever seen this can before.

A. I have.

Q. When did you first see it?

A. On August 18, 1945.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of R. F. Love.)

Q. From whom did you receive it?

A. From Narcotics Officer Grady.

Q. Did you make a test of the contents of that can? A. I did.

Q. In accordance with your usual practice, as you have testified? A. I did. [2]

Q. What did you determine the contents of that can to be?

A. Found it contained smoking opium.

Q. Did you make any quantitative test?

A. No.

Q. But the contents of the can are smoking opium? A. Yes.

Q. Has that can been in your continuous possession until produced today at this trial?

A. It has, yes.

Mr. Davis: That is all.

Mr. Duane: No questions.

Mr. Davis: May Dr. Love be excused?

Mr. Duane: Yes.

The Court: We will take the morning recess at this time. Ladies and gentlemen, it is customary to take a recess in the middle of the morning session and in the middle of the afternoon session of five to ten minutes. We will take the morning recess in this case at this time. During those times that you are absent from the courtroom and during the trial of this case, either at noon time or after adjourning finally for the day, or in the recesses, it is your duty not to converse among yourselves or with any other person on any subject connected with

the trial of the case, nor are you to form or express any opinion concerning the case until it is left in your hands for [3] decision. We will take the morning recess at this time.

(Recess.)

The Court: The jurors are all present. You may proceed.

Mr. Davis: Call Mr. Grady.

WILLIAM H. GRADY

called as a witness on behalf of the Government,
sworn.

The Clerk: Will you state your name to the court and jury?

A. William H. Grady.

Direct Examination

By Mr. Davis:

Q. Mr. Grady, what is your occupation?

A. I am an agent of the Federal Bureau of Narcotics.

Q. How long have you been engaged in that occupation?

A. Approximately four and a half years.

Q. Do you know the defendant in this case, Stephen Sorrentino? A. Yes.

Q. How long have you known him?

A. I have known Stephen Sorrentino by sight since 1943.

Q. Directing your particular attention to the

(Testimony of William H. Grady.)

16th day of August, 1946 (1945)—the 15th day of August, 1946 (1945), did you have occasion to see him on that day? A. Yes.

Q. When did you first see him on that day?

A. I saw him in the basement of the Uptown Hotel.

Q. Who, if anyone else, was present with him at the time you [4] saw him?

A. There was a Government informer present.

Q. Will you describe the circumstances under which you saw him, that is, a physical description of the premises in which you saw him?

A. There is a room in the basement of the Uptown Hotel that is used as, it appeared to be used as a dark room for developing film. There was a door in the wall of the room connecting it with a small room that was used to store tools and cleaning equipment that is normally used in a hotel to clean carpets and floors and stairs.

Mr. Duane: Pardon me. May I have the witness speak up?

The Court: Yes. Did you hear the last answer? Read the last answer, Mr. Reporter.

(The record was read by the reporter.)

Mr. Davis: Continue.

A. As a result of a previous conversation with this informer I went——

Mr. Duane: Just a minute. Object to the testimony with reference to any previous conversation.

Mr. Davis: I am not asking for the conversation,

(Testimony of William H. Grady.)

your Honor. The witness can state that he had a conversation.

Mr. Duane: Well, if he did, but he has not so testified. He said, "As a result of the previous conversation."

The Court: He said, "As a result of a previous conversation," as I understood his answer. [5]

Mr. Duane: Possibly he did; possibly I am wrong.

The Court: Am I correct about that, Mr. Reporter?

(The record was read by the reporter.)

The Witness: A. As a result of this previous conversation with an informer I went to this dark room and tool room at approximately 9:30 p. m. on the evening of August 15, 1945. At that time I took a hammer and a nail and I made approximately ten to twelve holes in the door leading between the tool room and the dark room. This door did not appear to have been used. It had a table up against the door, and I made the holes from the dark room side toward the tool room side, and then I left the dark room and entered the tool room through another door from a hallway, closing the door on the tool room to keep the light out in the tool room with the light on in the dark room.

At approximately 11:00 p. m. I observed the defendant, Stephen Sorrentino, and an informer enter this dark room. They stood directly in front of the door, in front of the table, approximately two and

(Testimony of William H. Grady.)

a half feet from where I was standing on the opposite side of the door. I heard the informer say, "Did you bring the can of mud?" And the defendant said, "No, I didn't bring it; I will later on tonight or tomorrow." The informer then removed a roll of currency from his pocket and asked the defendant if he wanted the money then, and the defendant said, "No, you can pay me at the time I deliver the stuff." Shortly thereafter the defendant and the informer [6] left the room, and I didn't see them any more that evening.

Mr. Davis: Q. Tell me, Mr. Grady, from your experience of four and a half years in the Narcotic Bureau, does the word "mud" have any particular significance to you?

A. Yes, sir; that is an expression that usually refers to opium.

Q. Based on the same experience that you have had, does the word "stuff" have any particular significance to you?

A. It is commonly used to refer to narcotic drugs.

Q. Did you subsequently have another conversation with the informer? A. Yes.

Q. And as a result of that conversation did you or did you not on the afternoon or early evening of August 16, 1945, go to the vicinity of 45th Avenue in San Francisco? A. Yes, sir.

Q. Who, if anyone else, was present with you at that time?

(Testimony of William H. Grady.)

A. At that time I met an informer and a special employee, Mr. Lieberman, at the corner of Fortieth and Irving Streets at approximately 5:45 p. m. on August 16th. At that time I gave the informer \$375 of Government money, and I searched the informer, searched through his pockets and his clothes, to see that he did not—Well, I guess that is not allowed—to see he didn't have any narcotics on his person. The informer and the special employee then proceeded to a house located at 1678 Forty-fifth Avenue. [7]

Q. What, if anything, did you see at that address?

A. At that address I saw the informer and the special employee enter the house.

Q. Tell me, where were you in reference to the location of this particular residence that you testified that you saw them enter? Where were you located?

A. I was, at the time that they entered the house I was in an automobile on Forty-fifth Avenue, heading, facing south at the time that these two people entered this residence.

Q. About how far away from the entrance to the residence were you?

A. I would say approximately 150 to 200 feet. After they had entered the residence I proceeded to pass from the residence in a southern direction to approximately 250 feet from the entrance to the house. At that time I was south of this entrance.

(Testimony of William H. Grady.)

There was some building construction going on, some houses being built on the corner of Forty-fifth and Moraga, that was not on the exact corner, but on Forty-fifth Avenue, there was a row of houses being built facing Forty-Fifth Avenue between Moraga and Noreiga, on the west side. I entered one of these.

Q. Was that on the same side or a different side of the street than the residence?

A. The opposite side from the residence. I entered one of these partially-constructed houses. The lumber work, the lumber on the outside of this house had been finished; there was not any [8] stucco or any windows in the house, but there was a framework of lumber where the lumber was, the outside work was done on the front of the house, where it was enclosed in. I entered the front portion of the house, and using a pair of six-power Navy binoculars I kept the premises under observation.

Approximately 5:10 p. m. I observed the defendant drive up in a blue Pontiac coupe, license number 52-B-221. The defendant was dressed in a brown sports jacket, slacks, grey hat. I saw him enter the patio or the entrance of the house, where he passed out of my view. I continued my observation there, and approximately fifteen minutes later I saw the defendant leave the residence, enter his car, and drive away.

Q. About how far were you from the residence

(Testimony of William H. Grady.)

in this position in the building that you described?

A. 250 feet, approximately 250 feet.

Q. What was the condition of the weather that day?

A. That was a day of high fog, no sun, but ordinary visibility for the weather at San Francisco.

Q. You say it was around five o'clock that you saw him enter, and about 5:15 when you saw him leave?

A. Yes.

Q. You recognized him as the man that you knew as Stephen Sorrentino, from your previous acquaintance with him?

A. Yes.

Q. What, if anything, was the next thing that you did or saw? [9]

A. Approximately five minutes after the defendant left, the special employee and the informer left the residence and entered an automobile and drove south towards me, to Moraga Street, and then turned right, or west on Moraga, where I followed them closely, and at Forty-seventh they again turned right or to the north. I pulled alongside of the automobile and they both got out of the car and entered the Government automobile.

Mr. Duane: Just a minute. If the Court please, we will object to any such testimony on the ground it is incompetent, irrelevant, and immaterial, and hearsay as regards the defendant.

Mr. Davis: There was no conversation, your Honor; it is just——

(Testimony of William H. Grady.)

Mr. Duane: His transaction with a person out of the presence of the defendant.

The Court: I will overrule the objection.

The Witness: The special employee and the informer entered the Government car with me and the informer handed me a can that appeared to contain smoking opium.

Mr. Davis: Q. I will show you Exhibit No. 1 for the purpose of identification, and ask you if this is the can the informer handed you on that occasion.

A. I believe my initials are covered up by the sticker.

Q. Well, you can remove one end of the sticker.

A. Yes, all right. Yes.

Q. What is your answer, then? A. Yes.

Mr. Davis: Will you read the question to him, please?

(The question was read by the reporter)

The Witness: A. Yes.

Mr. Davis: Q. Did you place any mark upon this can at the time that you received it from the informer? A. Yes.

Q. And you have observed that mark on this can that you have identified now?

A. Yes, sir.

Q. What, if anything, did you do with this can after receiving it from the informer?

A. I then delivered this can of opium to the Internal Revenue Chemist, Dr. R. F. Lowe.

(Testimony of William H. Grady.)

Mr. Davis: Will the court bear with me for a moment? I believe that is all.

Cross-Examination

Mr. Duane: Q. Mr. Grady, you say you have been an agent for the Narcotic Bureau for about four and a half years, is that so?

A. Yes; since the 1st of July, 1942.

Q. You usually work with some other agent, do you not?

A. I won't say that I usually work with other agents. I have worked with other agents, and I have worked alone. [11]

Q. Do you know an agent by the name of Thomas McGuire? A. Yes.

Q. You have worked with him pretty regularly?

A. Two years past, I believe, Counsel, since I worked with him.

Q. What?

A. I believe it has been approximately two years since I have worked with Mr. McGuire.

Q. You say that approximately two years ago you worked together quite a bit, didn't you?

A. For about eight months, Counsel, if my memory serves me correctly.

Q. Mr. Grady, directing your attention to the 15th day of August, 1945, that is the date, isn't it?

A. Yes.

Q. You went to the Uptown Hotel, is that correct? A. Yes.

(Testimony of William H. Grady.)

Q. That is on Fillmore Street, between Folsom and Gover, isn't it?

A. 930 is the address. It is between——

Q. McAllister and Fulton?

A. Fulton and McAllister, yes.

Q. What time of the day did you go there, the first time you went?

A. Well, it was just the one time. That day I went there at approximately 9:30 in the evening.

Q. You went there at approximately 9:30 in the evening? [12]

A. Yes.

Q. You say you went to a room in the basement?

A. Yes, sir.

Q. How did you gain admission to that room?

A. Do you mean——

Q. Well, did you have the permission of anyone to go there?

Mr. Davis: I object to that question, your Honor.

Mr. Duane: It is preliminary.

Mr. Davis: Incompetent, irrelevant, and immaterial. I don't see what bearing it has on this defendant. There is no contention that he owned the hotel.

Mr. Duane: That is material.

The Court: I will allow it.

The Witness: I went to this room with the Government informer.

Mr. Duane: Q. Who is the Government informer?

(Testimony of William H. Grady.)

Mr. Davis: I object to that, your Honor, on the ground that we are not either privileged to or required to disclose the identity of the man.

The Court: Sustained.

Mr. Duane: Q. Tell me, is it your own Jerome Berry, also known as Jimmy Berry?

Mr. Davis: I object to that question on the same ground.

The Court: Sustained. The Government has the right to keep the identity of the witness undisclosed. [13]

Mr. Duane: Q. Do you know a man by the name of Jerome Berry, also known as Jimmy Berry? A. Yes.

Q. You do. Was he residing in that hotel, the Uptown Hotel, on the 15th day of August, 1945?

Mr. Davis: I make the same objection again, your Honor. It is an indirect way of trying to disclose the identity of the informer.

Mr. Duane: Not at all, your Honor. I will say to your Honor that we have a subpoena out for Mr. Berry. Mr. Berry would be a very material witness in this case with reference to many matters. I want this jury to get the whole story.

The Court: Well, I will sustain the objection because you have already asked the question which calls for information that may not be disclosed. The Government is entitled to have it kept secret.

Mr. Duane: Well, I won't ask about the informer. Let me put this question.

Q. Was there a man by the name of Jerome Berry, an employee of that hotel——

(Testimony of William H. Grady.)

Mr. Davis: I will make the same objection, your Honor. Counsel has already asked if Berry was the informer. That question has been objected to and stricken out. As to all the other questions, they are based on the same assumption.

The Court: The Court has to be guided by your questions. [14] It would be a travesty upon justice if the Court allowed the examination to be pursued after you have named the man and asked the witness whether or not he is the informer. I will sustain the objection to any question along that line.

Mr. Duane: Q. Were you taken to this room in the basement, or were you given permission to go to this room in the basement by anyone connected with the management of the hotel?

A. Well, I believe that this party was connected with the management of the hotel, but I can't say of my own knowledge that he was.

Q. But aside from this party, nobody else gave you permission, that is, the manager of the hotel, or the owner of the building, if you know him?

A. No, sir. I did not ask for permission.

Q. So you went there about 9:30 in the evening, and I think you said you took a hammer and a nail?

A. They were there, Counsel. I was in the tool room where these items were.

Q. You found a hammer and a nail there, and you picked them up, is that right?

A. I helped myself.

Q. What sized nail was it?

A. Oh, approximately—I am not a very good

(Testimony of William H. Grady.)

judge, but I brought along a sample, Counsel, so you could see. This is about the closest nail that I could find to size (producing nail from pocket).

Q. To the size of the one you used?

A. Yes.

Mr. Duane: If the Court please, we will offer this for the purpose of illustration.

The Court: Very well.

(The nail was marked Defendant's Exhibit A for illustration.)

Mr. Duane: Q. You don't know what penny-weight that nail is, do you? A. No.

Q. I don't, either. What kind of a hammer did you use? A. I used an ordinary clawhammer.

Q. A good-sized hammer?

A. Yes; just an ordinary hammer. I thought there was just one size hammer.

Q. As I understand your testimony, you drove that nail through the door? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Right through the panel of the door?

A. Through the panel of the door.

Q. How many holes did you make?

A. Approximately a dozen.

Q. You didn't ask the permission of the manager of the hotel [16] to do that, did you?

A. No.

Q. You made approximately a dozen?

A. Yes.

Q. Can you give us some idea of the location, the location of the holes on that panel?

(Testimony of William H. Grady.)

A. There wasn't any regular pattern; some were high and some were low, well, not any higher than the eye level.

Q. In a row, or up and down?

A. No, no pattern; at random. I just made them at random.

Q. Just at random? A. Yes.

Q. That was about 9:30 p.m.?

A. About 9:30 p.m. that I entered the hotel.

Q. Well, about what time did you make the holes in the door?

A. Approximately 10:00 o'clock.

Q. Approximately 10:00 o'clock? A. Yes.

Q. So you had been in the hotel for about half an hour? A. Yes.

Q. Had you been in the rooms upstairs?

A. No.

Q. At that time this man whom you refer to as a special employee of the Government was living up there, wasn't he?

A. Yes; I believe Mr. Lieberman was living in the hotel. [17]

Q. You believe Mr. Lieberman was living in the hotel. He is also known as Jack Mandel?

A. Yes, I believe he did use that name.

Q. Was he with you that night down in this room? A. I think he dropped in.

Q. You think he dropped in down in the tool room? A. Yes.

Q. Just casually?

A. No; he knew I was there, I believe.

(Testimony of William H. Grady.)

Q. It only took you a few minutes to punch these holes in the door, didn't it?

A. Yes; not too long.

Q. Then what did you do after that?

A. I turned out the light of the tool room; I went around in the tool room and I sat in a chair and waited.

Q. I see. Where was Lieberman and the informer at that time?

A. Lieberman stepped down during — along about that time I was in the tool room for just a moment or two, and then he left, and I didn't see Lieberman or the informer.

Q. Did you stay there until 11:00 o'clock? Did you stay in that room? A. Yes.

Q. Then tell us what happened at about eleven o'clock.

A. At about eleven o'clock the informer and the defendant Sorrentino walked into the room. [18]

Q. The informer and Sorrentino walked into the room? A. Yes.

Q. Together? A. Yes.

Q. And as they walked toward the room, or into the room, was there any conversation going on between them? A. No.

Q. Did you hear them talking?

A. No. I could hear a scuffling of feet but—I could hear the noise of them walking down the stairs but I couldn't hear any conversation.

Q. So you have them going into this room adjoining the room you were in. A. Yes.

(Testimony of William H. Grady.)

Q. What was the first thing that you heard?

A. The first thing—well, I heard the noise of them walking down the stairs, and the door was not locked, that is, the entrance to the dark room. I heard the door being pushed open and the informer and the defendant walked into my line of vision.

Q. You could see them? A. Oh, yes.

Q. Through these holes? A. Yes.

Q. Go ahead.

A. At that time I heard the informer say, “Did you bring the [19] can of mud?”

Q. Yes.

A. And I heard the defendant say, “No, I didn’t bring it, but I will get it later on tonight or tomorrow.”

Q. Then what happened?

A. The informer then said, asked the defendant if he wanted the money.

Q. Yes.

A. The defendant said, “No, I will take the money when I deliver the stuff.”

Q. Then what?

A. Then they had a conversation in regard to a girl, I didn’t understand the name of the girl, it was a name that I didn’t pick up, as they were talking. Then they turned around and left my vision.

Q. Well, about how long were they in the room?

A. Oh, I would say approximately ten minutes.

Q. About ten minutes? A. Yes.

(Testimony of William H. Grady.)

Q. How long did you stay in the room after that ten minutes?

A. I was in the room until about midnight, Counsel.

Q. You were in the room until about midnight?

A. Yes.

Q. Then where did you go?

A. I went home.

Q. You went home? A. Yes. [20]

Q. So you stayed in the room from eleven until approximately twelve?

A. Well, I came in——

Q. Well, from ten, I believe it was.

A. Yes, and probably more than that.

Q. Anyway, from the time they left the room, which was probably about quarter past eleven, you remained—— A. Yes.

Q. Until midnight? A. Yes.

Q. At which time you went home?

A. Yes, sir.

Q. Where do you live?

A. At that time, Counsel, I lived at 1080 Bush. Now I live out at the beach.

Q. At the time you were living at 1080 Bush?

A. Yes.

Q. I take it when you concluded then you were through for the night and didn't go back on the job until the following day, the 16th?

A. No. I was back there again, Counsel. I went home at twelve o'clock or approximately at that time, and along about one o'clock I had to go

(Testimony of William H. Grady.)

to work again. Along about 12:30 or 1:00 o'clock I got a phone call and I had to go out and work again, and I didn't get through that work that I was doing until approximately 2:30 or 3:00 o'clock, and at which time I again [21] went back to the hotel and entered the tool room.

Q. To the Uptown Hotel? A. Yes.

Q. You went back there about 2:30 in the morning?

A. 2:30 or 3:00 o'clock, yes, Counsel.

Q. Did you go down to this tool room again?

A. Yes.

Q. Did you see anybody down there?

A. I saw, I believe I saw the informer once in the—after I came back, once or twice.

Q. You went home at 12:00 o'clock midnight?

A. Yes.

Q. You went to your home at 1080 Bush street?

A. Yes, that is correct.

Q. That is between Leavenworth and Hyde streets?

A. No; the other way, counsel. Leavenworth and the next one down.

Q. Jones?

A. Very close to the corner of Leavenworth.

Q. Leavenworth and Jones? A. Yes.

Q. How long did you remain at home?

A. Approximately one o'clock, I think, counsel. At the time I left home it was approximately one o'clock.

Q. Will you tell us where you went then?

(Testimony of William H. Grady.)

A. Yes, sir. I went down to 737 Bush Street, where a man by [22] the name of Adelman lived.

Q. Then you say you returned to the Uptown Hotel at 2:30 in the morning?

A. 2:30 or 3:00 o'clock, yes, Counsel.

Q. How long did you remain there then?

A. Until approximately 7:30; 7:30 in the morning.

Q. Then you went home?

A. At that time I went to the office. I went to our district office, which at that time was at 68 Post Street.

Q. And then you say the next day, or, rather, that day, then, the 16th——

A. Yes, that was the 16th, Counsel.

Q. You went to a house in the 1600 block of Forty-Fifth Avenue? A. Yes.

Q. Did you go there alone, were you accompanied by anyone?

A. I did not go to the house. I didn't enter the house.

Q. Well, you went to the vicinity of the house?

A. Yes. Do you mean in my automobile? What would you want to know?

Q. Well, you went in your automobile?

A. I was in the Government automobile alone.

Q. Alone? A. Yes.

Q. Were you driving anybody else's car?

A. Yes.

Q. And Lieberman was in that car? [23]

A. Yes.

(Testimony of William H. Grady.)

Q. And was Berry also——

Mr. Davis: I object to that, also.

Mr. Duane: Q. Well, was there anyone else?

A. Yes, sir.

Q. There? A. Yes, sir.

Q. Of course, you are familiar with that house on Forty-fifth Avenue, aren't you?

A. Well, Counsel, I don't believe you would call it familiar. I haven't been to that house——

Q. You have never been in the house?

A. Over twice; I think I have been in the house once or twice.

Q. What? A. Once or twice.

Q. Of course, you know who occupied the house?

A. Yes.

Q. You knew who occupied the house at that time? A. Yes.

Q. And that was this informer that you speak of?

Mr. Davis: I object to that, your Honor. It is another means of identifying the informer.

Mr. Duane: I am not identifying the informer. It is a question I think I am entitled to an answer on.

The Court: I will sustain the objection. It is an indirect way of disclosing information which the law provides should be [24] kept secret.

Mr. Duane: Q. Didn't you know at that time that there were cans of opium in that house?

A. No.

Q. You did not? A. No.

Q. Didn't you know that there were cans of

(Testimony of William H. Grady.)

opium in the room in the Uptown Hotel, not only the room occupied by the informer, but the one occupied by Lieberman? A. No.

Q. You didn't know that? A. No.

Q. You didn't know they smoked up in that room?

A. I had heard that they smoked there, Counsel.

Q. You heard that? A. Yes.

Q. And you heard it while you were engaged as a narcotics officer isn't that so? A. Yes.

Q. Did you make any investigation to ascertain whether or not there was any truth in what you heard? A. No.

Q. You did not? A. No, sir.

Mr. Duane: I think that is all. [25]

The Court: You, gentlemen, wish to adjourn earlier today?

Mr. Davis: Yes, your Honor.

The Court: Is it a convenient time?

Mr. Davis: I believe it is, your Honor, before we get started with another witness.

The Court: We will take a recess, ladies and gentlemen, in this case, because I believe that counsel have an engagement in another court, and we will reconvene at two o'clock. The jurors will please return at two o'clock, and bear in mind it is your duty not to discuss the case among yourselves or with any other person, or form or express any opinion concerning the case until it is finally sub-

mitted to you for decision. We will recess until two o'clock.

(A recess was taken until two o'clock p.m.)

Afternoon Session, January 14, 1947, 2:00 p.m.

The Court: The jurors are all present.

Mr. Duane: If the Court please, I would like to recall Mr. Grady for further cross examination.

The Court: Very well.

WILLIAM H. GRADY,

recalled; previously sworn.

Cross Examination (Resumed)

Mr. Duane: Q. Mr. Grady, calling your attention to the dark room that you have referred to, and the tool room in this Uptown Hotel, about how far are those rooms from the staircase that you have to use?

A. You mean from the base of the stairs, from that point, would you say?

Q. Yes.

A. I would judge approximately—the entrance to the tool room, of course, is closer—I would say about 15 feet from the base of the stairway.

Q. Then there is a door to the tool room and a door to the dark room? A. Yes.

Q. The door to the dark room is further from the stairs? A. Yes.

Q. Than the door to the tool rom.

A. Yes. [27]

Q. You spent your time in the tool room?

(Testimony of William H. Grady.)

A. Yes.

Q. You would say that that is about 15 feet from the staircase. By the way, did you come down the stairs to that room? A. Yes.

Q. Where do the stairs come out on the upper floor?

A. From the rear, you go down a rear hall, as I recall it, Counsel; you walk down—you come into the lobby of the hotel and then you step up a few steps, then you walk down the hall, and at the end of the hallway there is a staircase.

Q. Is that behind the elevator? A. Yes.

Q. I take it there is an elevator there?

A. Yes, there is an elevator. It is just after you come out of the lobby.

Q. How long have you known Sorrentino?

A. I would say since 1943.

Q. How many times have you been in his house?

A. Once.

Q. Just once? A. Yes.

Q. When you went to his house you went with other agents, did you not?

A. Yes, with Agent Hayes, and Agent Burton, and Agent Collett, and United States Marshal Jim Egan, and I believe there were [28] two State agents there at that time.

Q. On that occasion did you make a search of his house? A. Yes.

Q. Did you find any contraband of any kind, narcotics, or anything? A. No, no narcotics.

(Testimony of William H. Grady.)

Q. Was that the only occasion that you were there? A. Yes.

Q. Do you know that other agents have been there on other occasions?

A. I have heard stories and hearsay evidence to that effect, but I have no direct knowledge of such things.

Q. Did you participate in a surveillance of the house of the defendant from other premises with spy glasses? A. No, sir.

Q. You did not? A. No.

Q. You know that was done, don't you?

A. No.

Q. You do not know? A. No.

Q. You don't know that Agent McGuire did that? A. No, not of my own knowledge.

Q. Not of your own knowledge? A. No.

Q. You have heard it? [29]

A. As far as Agent McGuire watching the place with spy glasses, I don't believe I have heard that. I have heard lots of things but I have never heard that, Counsel.

Q. These incidents that you heard of have gone on over the months, haven't they?

A. I don't quite follow you. You mean that I have heard rumors that McGuire was watching Sorrentino over a period of a month?

Q. Not only that McGuire or any other agents were watching his premises, but that his home has been searched, that he has been followed out of San

(Testimony of William H. Grady.)

Francisco and around San Francisco; you know that? A. No.

Mr. Davis: I have not objected to this, but I think it is objectionable as incompetent, irrelevant, and immaterial, and having no bearing on the issues in this case. I have not objected to it preliminarily, but I think we are going far afield, and if it is not connected up with this case——

Mr. Duane: I am going to connect it up in my defense. However, I will bow to your Honor's ruling.

The Court: Well, I think the objection of the district attorney is good, Mr. Duane. It is not within the reasonable limits of the indictment.

Mr. Duane: I will ask one more question.

Q. Mr. Grady, were you present in the house of the defendant [30] when he was struck in the face by McGuire? A. No.

Q. You were not? A. No.

Q. You heard that, though, didn't you?

Mr. Davis: I object to what he heard.

The Court: Sustain the objection.

Mr. Duane: That is all.

Mr. Davis: That is all.

Mr. Davis: I will call Mr. Jack Lieberman.

JACOB LIEBERMAN,

called as a witness on behalf of the Government;
sworn.

The Clerk: Will you please state your name to
the Court and the Jury?

A. Jacob Lieberman.

Direct Examination

Mr. Davis: Q. Mr. Lieberman, you say your
name is Jacob Lieberman? A. That's right.

Q. Are you known by any other name, or were
you ever known by any other name?

A. Well, in various different cities, I was known
by different names in different cities. [31]

Q. Well, I will come back to that later. What is
your occupation?

A. I work for the Bureau of Narcotics as a
special employee.

Q. How long have you been engaged in that
occupation? A. Close to seven years.

Q. How are you paid? A. By the day.

Mr. Duane: I object to that as incompetent,
irrelevant, and immaterial.

The Court: What is the materiality?

Mr. Davis: My only purpose, your Honor—it
probably is immaterial—I merely wanted to estab-
lish what his relationship was with the Bureau of
Narcotics.

The Court: Well, he is an employee, and he is
paid by the bureau.

Mr. Davis: Yes, that is true.

(Testimony of Jacob Lieberman.)

The Court: That is true, is it?

The Witness: That is correct.

The Court: I think that would cover it.

Mr. Davis: Yes, your Honor.

Q. In light of your testimony that you are a special employee of the Bureau of Narcotics, I will ask you to explain your answer to my question: Were you ever known by any other name? Explain the answer which you gave to that question.

A. Yes. I am known by other names. When I work for the bureau [32] in various different cities I never use my right name.

Q. Do you know the defendant in this case, Stephen Sorrentino? A. Yes.

Q. When did you first have occasion to meet Sorrentino?

A. Well, around the first week in August I was introduced to him by the informer.

Q. August, 1945? A. 1945.

Q. Directing your particular attention to the 15th day of August of 1945, did you have occasion to meet the defendant on that day? A. Yes.

Q. Where did you meet him?

A. I met him at the Uptown Hotel, in the lobby.

Q. About what time of the day or night was that? A. That was 11:00 p.m.

Q. Who, if anyone else, was present with you at the time you met him? A. The informer.

Q. Do I understand your testimony to be that—withdraw that. You had met Sorrentino previously to that time? This is not the first occasion; is that right?

(Testimony of Jacob Lieberman.)

A. That's right. I met him quite a number of times before.

Q. You met him in the lobby about 11:00 o'clock, the informer and you met Sorrentino?

A. Yes.

Q. What took place immediately thereafter?

A. Excuse me just a moment. I met Sorrentino in the lobby of the hotel coming in by himself, and I was by myself, and the informer was up in the room at the hotel.

Q. Do you recall the number of the room?

A. 302.

Q. What, if anything, did you and the defendant do after you had met in the lobby?

A. He asked me where is the informer, you know, by his name, and I told him, "I will call him, he is upstairs in his room." I went to the phone. I called him down. I told him, "Steve is downstairs." And he told me to hold onto him until he comes down. The informer come down in a few minutes and they both went to the rear of the basement—to the rear of the lobby, and then went down the basement.

Q. Can you describe the situation there in relation to the lobby and the basement, or the stairway to the basement? What, actually, did you see, physically?

A. The informer came down by the elevator and motioned to Steve Sorrentino with his hand as though to come here. I sat there, I didn't go along at all, but they both went to the rear of the lobby.

(Testimony of Jacob Lieberman.)

They walked up a couple of steps and they went farther down to where the stairs was leading to the cellar.

Q. Had you any occasion, either before that time or after, to examine that particular stairway?

A. Yes, I went down a few times, down to the basement. [34]

Q. You know of your own knowledge that the stairway that you saw them go down leads to the basement? A. Yes.

Q. Did you see the defendant and the informer again that same evening, or morning, whenever it was?

A. I met them again about 1:30 or 2:00 o'clock in the morning in my room, 302—303.

Q. Who was with you at the time that you met the defendant and the informer in your room at that time, if there was anybody else?

A. There was no body else.

Q. Did you have any conversation with the defendant or did the informer have any conversation with him in your presence at that time?

A. I had a conversation with Steve Sorrentino later—several times before, about narcotics, and about the quality of opium. That particular day—that particular night when he was in my room with the informer, the informer asked him about narcotics, about opium, again, and Steve Sorrentino told him that he has the best quality of opium around, and the informer asked him if he wants to sell him some, a can of opium. Steve told him that

(Testimony of Jacob Lieberman.)

he will sell—the following day he will bring a can of opium, or, rather, he can bring it in that particular day, he may bring the can of opium with him, but he will make several calls and then if he can't get the party in, this particular [35] party is going to bring the can of opium to the hotel. Steve went down a few times and telephoned and tried to get this party, and each occasion he came back to the room and said that he can't get the party in.

Q. Did you have any conversation with Sorrentino while you and the informer and he were in the room? A. Yes, I did.

Q. To the best of your recollection, what was that conversation?

A. Steve asked me how many jars do I get out of a 5-tael tin. I told him I get 8. He said—I asked about himself—he gets 10 out of it. I told him then, “How do you do it?” He told me, “You take the can and steam it, you pick up two extra jars by that.” I told him I didn't know that way.

Q. In your conversation with Sorrentino previous to this time were you known to him by the name of Jacob Lieberman?

A. No; by Jack Mandel.

Q. By Jack Mandel. In your conversation with Sorrentino, did you tell him what your business was, or what type of business you were in?

A. No. The only thing he knew was narcotics. That is all I told him about.

Q. You say you told him about narcotics?

A. Yes.

(Testimony of Jacob Lieberman.)

Q. What was it you told him?

A. That I generally buy narcotics.

Q. Pardon? [36]

A. I buy narcotics and I sell narcotics.

Q. That is what you told Sorrentino?

A. Yes.

Q. Coming back to the conversation in the room, did you or the informer in your presence have any further conversation with the defendant concerning the can of opium, after he had made these phone calls?

A. Yes. The last conversation I had with him on that particular day was he told me he will bring the can of opium the following day, and the informer told him not to bring it the following day, but to bring it over to 1678 Forty-fifth Avenue. Steve told him, "At what time?" He told him five o'clock. He said, "I'll be there promptly at five o'clock."

Q. Going back to this conversation, or this entire transaction in the room on the 15th, what time was it you said that you first met Sorrentino on the 15th?

A. It was about eleven o'clock, eleven p.m.

Q. That is at night?

A. At night time.

Q. How long was Sorrentino with you during that night and the next morning, if he was? In other words, how long did the telephone calls and conversation take?

A. Until about seven a.m. the following morning.

Q. That was the time that Sorrentino told the

(Testimony of Jacob Lieberman.)

informer that he would deliver the can of opium to this house on Forty-fifth [37] Avenue?

A. Yes.

Q. Did Sorrentino leave at that time?

A. He left about seven a. m.

Q. In the morning? A. Yes.

Q. When did you next see Sorrentino, the defendant?

A. The next time I saw him was 1678 Forty-fifth Avenue about five o'clock, when I heard a noise——

Q. Was that the next day?

A. Yes, that was the 16th. Somebody knocked at the door and hollered, "Milk man." The informer and I went to the door and we opened up the door and Steve Sorrentino came in with two bottles of milk in his hand. He gave them to the informer, and the informer took them off the steps, and at the same time pulled out a package from his hand and says, "Here is the can of opium," to the informer. The informer gave me the can of opium, and the informer gave him the money. Steve counted the money right in my presence, and I asked him, "Is all the money there?" A couple of seconds passed by. He said, "Everything is there." Then he told the informer to open up the can and take a look at it. The informer opened up the can, and we looked at it, and we saw it was black stuff; it was right to the top. We closed up the can and stood there a few moments, and before he left he said, "I am expecting some heroin [38] in. As

(Testimony of Jacob Lieberman.)

soon as I get it I am going to give you fellows the first crack at it." I thanked him very much. I told him to not forget about it, and as he left I said, "So long, Steve." Steve said, "So long, Jack, I'll meet you back at the hotel." We stayed there a few more minutes, and then we left, the informer and I left in our car and we went as far as on Fortieth Street, Forty-seventh and Moraga, Forty-seventh Avenue and Moraga Street, when we met Agent Bill Grady. We got out of our car and went into Agent Grady's car, and the informer give Agent Grady the can of opium, and then I put my initials on that particular can.

Q. I will show you Government's Exhibit No. 1 for Identification, and ask you to examine it and tell me, tell the jury, if that is the can which the informer received from Sorrentino in this house on Forty-fifth Avenue.

A. That is the can. There is my initials that I put on it.

Q. You see your initials on it? A. Yes.

Mr. Davis: At this time I ask Government's Exhibit No. 1 previously for identification be received in evidence.

Mr. Duane: Objected to as incompetent, irrelevant, and immaterial; the proper foundation is not laid.

The Court: Objection overruled. It may be admitted.

(U. S. Exhibit 1 for Identification was thereupon admitted in evidence.) [39]

(Testimony of Jacob Lieberman.)

Mr. Davis: Q. Tell me, Mr. Lieberman, before you went to the house on Forty-fifth Avenue with the informer on that day, had you met Agent Grady prior to the time that you went into the house?

A. Yes. I met Agent Grady at Fortieth Avenue and Irving Street, and he came out of his car and we walked out of our car also. I saw him search the informer, and at the same time he searched me. Then he gave the informer a bundle of money. He told him, "Here is the money," and the informer took the money and put it in his pocket. That was about 4:45, around that time.

Mr. Davis: Will the court bear with me a moment?

The Court: Yes.

Mr. Davis: Q. Have you ever been convicted of a felony? A. Yes, sir.

Q. When was that? A. 1931.

Q. And what was it for?

A. Narcotics.

Q. Where was it?

A. Atlanta Penitentiary.

Q. I mean, what city were you convicted in?

A. Brooklyn, New York.

Mr. Davis: That is all.

Cross-Examination

Mr. Duane: Q. You say you are employed by the Government? [40] A. Yes.

Q. You are? A. Yes.

Q. By what department of the Government?

(Testimony of Jacob Lieberman.)

A. Bureau of Narcotics.

Q. How long have you been so employed?

A. Since 1940, I think.

Q. Since 1940, you think? A. Yes.

Q. Are you a civil service employee?

A. No.

Q. Are you a paid regular monthly salary?

A. No. I am paid by the day.

Q. Paid by the day?

A. That's right.

Q. Do you work every day?

A. Not every day. The only time I get paid, the only money I get is by the days I work. If I don't work I don't get paid.

Q. You just work from time to time?

A. Yes.

Q. Is that so? A. Yes.

Q. Aside from the name "Jack Mandel," what names are you known by? A. Jack Davis.

Q. Jack Davis? [41]

A. Yes; various different times. Jack Cohen. I always use that "Jack" name all the time.

Q. What other surnames do you use?

A. I can't recall.

Q. How about the name Harwood?

A. Never did.

Q. Never used that name? A. No.

Q. Do you remember testifying in the case of United States v. Albert Adelman? A. Yes.

Q. In this courtroom? A. Yes.

Q. On the 11th of June, 1946?

(Testimony of Jacob Lieberman.)

A. I don't remember that particular day, but I know I testified in court.

Q. You remember that you did testify in that case? A. Yes.

Mr. Duane: Mr. Davis, will you stipulate that this is a true and correct copy of the transcript of this witness in the Adelman case?

Mr. Davis: Yes, I will so stipulate.

Mr. Duane: Q. I will show you here a transcript of your testimony taken in the case of United States vs. Albert Adelman, before the Honorable Louis E. Goodman, in this court, case No. [42] 30,076-G, and I will direct your particular attention to a portion of your testimony that appears on page 7, lines 9 and 10, which is underlined in red pencil. I will ask you to read that.

Mr. Davis: May I ask that before the witness answers it that I have an opportunity to read it, myself?

The Witness: I don't think I mentioned that particular——

Mr. Duane: Just a minute.

The Court: No. You are to read it.

Mr. Duane: Have you read it?

A. Yes.

The Court: Just read it and then don't do anything else.

Mr. Duane: Just read it, yourself.

Mr. Davis: What is it, 9 and 10?

Mr. Duane: I have underlined it.

(Testimony of Jacob Lieberman.)

“Any other names?”

“A. Well, Jack Harwood sometimes; in different cities I have different names.”

Q. Where do you live, Mr. Lieberman?

A. New York City.

Q. Where in New York City?

A. 361 South Third Street.

Q. 361 South Third Street? A. Yes.

Q. What is that near? [43]

A. Brooklyn; that is in Brooklyn.

Q. It is in Brooklyn? A. Yes.

Q. Then you don't live in New York City?

A. Well, that is considered New York City.

Q. It is across the river, isn't it?

A. Yes, right across the bridge, a small bridge; takes only five minutes to get across.

Q. Now, you say you were convicted of a felony in Brooklyn. A. Yes.

Q. How long had you lived in San Francisco on August 15, 1945? A. Previous to that?

Q. What? A. Previous to that?

Q. Yes, previous to that date.

A. I arrived in San Francisco about the third week of July of 1945.

Q. When did you first meet Sorrentino?

A. Around the latter part of the first week of August; around the 8th.

Q. About the 8th of August?

A. 8th of August, 1945.

Q. You had never known him before?

A. No.

(Testimony of Jacob Lieberman.)

Q. Did you see him frequently thereafter?

A. Yes. [44]

Q. When you first met him on or about the 8th of August, did you have any discussion with him about narcotics? A. No.

Q. You did not? A. No.

Q. When did you first discuss narcotics with him?

A. Around the—probably about three days later.

Q. Along about the 11th?

A. Around the 11th or 12th.

Q. Between the 8th and the 11th and 12th had you seen him? A. Yes.

Q. Many times?

A. Oh, probably two or three hours at a time at the Uptown Hotel.

Q. You didn't discuss narcotics on those occasions?

A. No, I was not free with him talking about it; I didn't know him so well to talk to him then. I was waiting for him to come out with it first.

Q. You were waiting for him to come out with it?

A. Yes. I really didn't have the right occasion to speak.

Q. You were at that time occupying room 303 in the Uptown Hotel? A. That is correct.

Q. Room 302 was occupied by Jimmy Berry?

A. Yes, sir.

Q. There was a door between the two rooms that was open; isn't that so?

(Testimony of Jacob Lieberman.)

A. Yes, that was open all the time. [45]

Q. So you both had access to each other's rooms?

A. Yes.

Q. Let me ask you, did you have in your room any narcotics, opium or otherwise?

A. No.

Q. You did not. Did Berry have any in his room?

A. I didn't see any if he did have.

Q. You never saw any? A. No.

Q. Will you say that no one smoked opium in your room? A. Oh, yes.

Q. They did? A. Oh, yes.

Q. You also sold opium in that room, didn't you? A. No, sir.

Q. You did not? A. No, sir.

Q. During this time you were friendly with Mr. Grady, weren't you? A. Yes.

Q. So that having met Sorrentino on the 8th of August and you saw him on the 11th and 12th of August, but up to that time you had no opportunity, or the occasion did not present itself where you could discuss narcotics with him; that is correct? A. Correct. [46]

Q. When did you first discuss narcotics with him?

A. Oh, around, I should say, the 12th; I should say the 12th, that particular night.

Q. That particular night. Where?

A. That was in room 302.

Q. Room 302? A. Yes.

(Testimony of Jacob Lieberman.)

Q. That was Berry's room? A. Yes.

Q. About what time of the day or night?

A. That was about, I should say, about ten p.m.

Q. On the night of the 12th? A. Yes.

Q. Give us the conversation.

A. Well, I went up to Jim Berry's room, and I found Stephen Sorrentino and Jimmy Berry were lying on the bed. Stephen Sorrentino was smoking opium. That is the first time I saw opium being smoked, and while the talk was going on——

Q. What were they talking about?

A. Talking about opium, the quality of opium, how much opium was in the country, the price of various—well, opium and drugs and all that stuff, and that is the first time I got in conversation with Stephen Sorrentino about opium.

Q. You were present during all of this conversation? A. Yes.

Q. You heard it between them? [47]

A. Yes. I spoke with him, myself, too.

Q. You joined in the conversation?

A. Yes.

Q. This was on the 12th?

A. 12th, about ten p.m.

Q. Go ahead, tell us your recollection about it. What else?

A. This was going on until about six or seven o'clock in the morning, this smoking.

Q. And talking about narcotics?

A. Yes, and everything in general.

Q. Well, can you tell us anything else?

A. Well, yes. He spoke about work, about the

(Testimony of Jacob Lieberman.)

war, the Japanese attack, the labor situation, unemployment, various things, whatever came into our minds we spoke about. We spoke about women, also.

Q. All of this time they were smoking opium?

A. Yes.

Q. He answered when you spoke about opium or about narcotics? A. Yes.

Q. In particular? A. Yes.

Q. Well, can you recall anything in particular on that subject? A. Yes.

Q. Tell us.

A. I asked Steve Sorrentino about the opium that he was smoking. [48] Steve told me, "This is good stuff."

Q. You say you asked him. Tell us what was said.

A. Well, I can't say exactly the words, but I am giving it to you to the best of my knowledge. We spoke about narcotics there. I asked Steve how was the stuff. He said, "Any time I smoke I always smoke the best of stuff." I told him, "I don't blame you; if you bring your own you are going to bring the best."

Q. Go ahead.

A. Well, that is about the general idea how we spoke about it.

Q. Well, you don't recall any other conversation?

A. Well, I just can't recall—all I was interested in was narcotics, and that was all.

(Testimony of Jacob Lieberman.)

Q. You use narcotics, don't you? A. No.

Q. You don't? A. No, sir.

Q. Would you say that you did not smoke opium up in your room there in the Uptown Hotel?

A. No, I did not smoke opium there. I was just fooling around with the stick, the opium pipe, they call that a stick. I laid down on the bed and made believe I was going to smoke, because Steve asked me if I smoked, and I told him, once in a while I do; I don't feel well at the present time to smoke." But to show I know something about it, I just took the opium pipe and stuck it to my mouth to make believe I know how to smoke. [49]

Q. You do know something about it?

A. Well, after seeing Steve Sorrentino smoke quite a number of times I know a little bit about it.

Q. You never knew anything about it before then? A. No.

Q. Never did? A. No.

Q. You used opium in 1931, didn't you?

A. I never did.

Q. You never did? A. Never did.

Q. Did you never just sell it? A. Yes.

Q. When did you see him after August 12th?

A. After August 12th?

A. I met him on the 14th, the 15th of—I met him on the 13th and the 14th, practically every day in the week I met him. He always used to come to the hotel, every night.

Q. Every night?

A. Practically every night, now and then.

(Testimony of Jacob Lieberman.)

Q. You were devoting most of your time to being right there in the room?

A. No. I was always around the lobby, standing outside; once in a while going down town to eat, coming uptown again. [50]

Q. You want this jury to understand you were employed by the Government at that time?

A. Yes.

Q. What salary were you getting?

A. \$10 a day.

Q. \$10 a day? A. Yes.

Q. Do you get paid daily?

A. Well, every week or so, whenever, like seven days, or eight days, or nine days, I get my money, and I pay my room rent. From that \$10 I pay my room rent, and I paid my board and everything.

Q. You were paid about every seven or eight or nine days?

A. About every other week, ten days or twelve days.

Q. Mr. Lieberman, on the 13th or the 14th, did you have any conversation with the defendant about narcotics? A. Yes.

Q. Can you relate any of that? Can you relate any of the conversation and when you had it?

A. Yes, I can relate some of the conversation I had with him.

Q. Tell us when.

A. Around the 14th.

Q. The 14th?

(Testimony of Jacob Lieberman.)

A. Around the 14th, on that evening, probably around ten o'clock or eleven o'clock at night. [51]

Q. Where was that?

A. That was in my room at that time.

Q. What was the conversation?

A. Well, about smoking opium.

Q. Well, what was it?

A. Well, he asked me about—I asked him, rather, how many jars of opium does he get out of a 5-tael can. He told me 10. I told him, “How come, we only get 8,” the informer and I only get 8. He told me, “Well, that is bad stuff.” He said, “I have good stuff.” He said, “My stuff pours 10. That is about the gist of the conversation we had.

Q. That was about all on the 14th?

A. Yes.

Q. Did you see him on the 15th?

A. Yes.

Q. Where?

A. The Uptown Hotel.

Q. Where in the Uptown Hotel?

A. Oh, he come into the lobby there.

Q. Coming into the lobby? A. Yes.

Q. Did you have any conversation with him there?

A. Yes, around eleven o'clock at night he came in.

Q. Well, what was the conversation?

A. Well, when he came in around eleven o'clock at night he asked me if Berry was there. I told

(Testimony of Jacob Lieberman.)

him, "Berry is not here right [52] now, but he is up in his room. Do you want me to call him? I will call him." I went to the phone and I called him.

Q. Were you there when Berry came down to the lobby? A. Yes.

Q. What did you do? Did you leave them there?

A. They just went downstairs and that is about all. I left them there.

Q. You didn't go with them?

A. No, I didn't go with them.

Q. Where did you go then?

A. I think I must have stood in the hallway, in the lobby for about fifteen minutes, and then I went to my room again.

Q. Did you leave the room again that night?

A. No. I sat there practically all—up until early in the morning. I went down in the lobby a few times and I came up again.

Q. Did you see Sorrentino again that night?

A. Yes.

Q. You did? A. Yes, sir.

Q. What time did you see him?

A. Five o'clock in the evening. You are referring to the 16th; that was the following day.

Q. Between the time he left you in the lobby on the night of the 15th about eleven o'clock, the next time you saw him was [53] about five o'clock in the afternoon?

A. No. I saw him one o'clock in the morning

(Testimony of Jacob Lieberman.)

in my room when they were, the informer and Stephen Sorrentino came into my room one o'clock in the morning. I sat around until about seven o'clock in the morning. In between they went downstairs, he went downstairs, Steve Sorrentino went downstairs a few times, I mean not a few times, but he made several phone calls, and then he went upstairs again to my room again.

Q. The next day, along about five o'clock, or a little before five, did you meet Mr. Grady?

A. At quarter to five.

Q. In the afternoon? A. Yes.

Q. Where did you meet him?

A. I met him at Fortieth Avenue and Irving Street.

Q. Was anyone with you at that time?

A. Yes.

Q. Who?

A. The informer was with me.

Q. Were you in an automobile?

A. Yes. I was in the informer's automobile.

Q. That was at Fortieth and Irving, did you say? A. Yes.

Q. Did you get out of the machine?

A. Well, I opened the door—yes, I got out a little bit. [54]

Q. Did Berry get out? A. Yes.

Q. Did Grady get out of his car?

A. Yes, he got out of his car and he walked over to our car.

Q. Then what happened there?

(Testimony of Jacob Lieberman.)

A. I know he frisked the two of us, he searched the two of us, just fanned us around, then he gave him the money.

Q. When he gave him the money what did you do?

A. He gave the informer the money. The informer took the money, put it in his pocket.

Q. Did he say anything about the money?

A. No.

Q. Then what happened after that?

A. Well, we then went to 1678 Forty-fifth Avenue.

Q. Did anyone else let you in there?

A. The informer had a key.

Q. The informer had a key?

A. He opened up the door. We walked in.

Q. It was his home, wasn't it?

Mr. Davis: I will object to that.

The Witness: I don't know whose home it was.

The Court: Read the question, please.

(The question was read by the reporter.)

Mr. Davis: I objected to the question.

The Court: Sustain the objection on the ground the Government [55] is entitled to keep secret the information concerning the informer. The court has a duty not to allow such information to be disclosed. I think you should not pursue that, Mr. Duane, even indirectly, because it is improper.

Mr. Duane: I just want to say to your Honor this: It curtails the cross-examination to this ex-

(Testimony of Jacob Lieberman.)

tent, it is my purpose to show that at the time that that house was entered there was in that house cans of opium similar to this.

The Court: Well, you are not prevented from introducing any evidence that you wish to, but I don't see that the questions that you are asking have to do with that subject.

Mr. Duane: Only to this extent, if the Court please, I want to establish that it was the property of this so-called informer contained in his house.

The Court: You have already asked the witness whether there was any opium in there.

Mr. Duane: No. I referred to the room in the hotel, if the Court please.

Mr. Davis: Well, your Honor, my objection is, of course, as your Honor knows, based upon the rule of law that we don't have to disclose the identity of the informer, and as far as Mr. Duane's purpose, if he can prove it he is perfectly entitled to prove, it but he can't try to prove it by indirection and by innuendo and by cross-examination of my witness.

Mr. Duane: I don't want to prove it by innuendo. I [56] want to get the facts; that is all.

The Court: I will sustain the objection.

Mr. Duane: Q. So that you and the informer went into the house? A. Yes.

Q. You have, as I recall your testimony, testified that subsequently the defendant arrived at the house; is that right? A. Yes.

(Testimony of Jacob Lieberman.)

Q. And the defendant gave to the informer this can that you have identified? A. Yes.

Q. Is that right? A. Yes.

Q. The informer gave to the defendant the money? A. Yes, sir.

Q. Is that correct? A. Yes.

Q. What happened after that?

A. Well, he counted the money and I asked him, "Is everything there?" He said—he didn't answer for a minute, a few moments, a few seconds, and he was counting the money. I saw him count the money. He said, "It is okeh, everything is there," and he put the money in his pocket and we got to talking, kept on talking for another five or six or seven or eight minutes. I didn't time myself, but that is the best of my [57] judgment. We were there about seven or eight or ten minutes, probably. Before he left he told us, "I am going to get in some heroin; as soon as I get it I will give you fellows the first crack at it." I told Steve, "Okeh, thanks a whole lot."

Q. Then he left? A. Yes, he left.

Q. Then you left, or did you both leave, you and the informer?

A. We left about five minutes later.

Q. You knew, did you not, at that time, that Agent Grady had the house under surveillance?

A. Well, I left him at Fortieth and Irving. I kept going with the informer. Whether he was in the back or whether he was in front of me, or on

(Testimony of Jacob Lieberman.)

the side, I don't know. I had an idea he was in back of me at the time.

Q. As a matter of fact, Grady told you that he was going to be there in the vicinity watching, didn't he? A. Yes.

Q. Sure, and you had every reason to believe that he was watching the place?

A. I imagine so.

Q. After August 15th did you ever see the defendant again? A. Yes.

Q. Many times, did you?

A. Yes, yes, many times. I met him on the 16th. That is when he sold us the can of opium. [58]

Q. Well, after the 16th, after this alleged transaction. A. Yes, yes.

Q. You saw him?

A. I saw him quite a number of times.

Q. On the 16th of August, and prior to the 16th of August, both you and Jimmy Berry were possessed of cans of opium like that, were you not?

A. No.

Q. No? A. No.

Q. When did you last have any opium in your possession prior to August 16th?

A. I think that was the last time.

Q. That was the last time?

A. Yes. Then I had heroin after that.

Q. When was the time before the last time that you had any opium in your possession? Do you remember when was the last time?

(Testimony of Jacob Lieberman.)

A. That was the last time I had any opium in my possession.

Q. It would be the last time. When was the time before that that you had opium in your possession?

A. I was buying for the Government from different individuals.

Q. When you would buy it for the Government what would you do with it?

A. Give it to them. I put my initials on there and I give it to them. [59]

Q. Did you ever buy any for yourself?

A. No, sir.

Q. Never did.

A. I had no occasion to.

Q. You did not? A. No, sir.

Q. Did Berry buy any for himself, that you know of? A. Not that I know of.

Q. Not that you know of?

A. Not to my knowledge.

Q. Never saw any in his house?

A. Not to my knowledge; I never saw anything in his house.

Mr. Duane: That is all.

Redirect Examination

Mr. Davis: Q. Mr. Lieberman, you testified on cross-examination that you had met Sorrentino on several occasions prior to the time you saw him smoking opium in the room, but you had never mentioned narcotics to him, that you were waiting for him to come out with it? A. Yes.

(Testimony of Jacob Lieberman.)

Q. If I quote you correctly, is it or is it not a fact that he was the first one who mentioned narcotics to you? I mean as between the two of you, who mentioned it first?

A. Well, he did. The very first time he mentioned narcotics to me, I waited for him to make it first, so he made it first.

Q. That was this night that you found him smoking up in the [60] room?

A. That's correct.

Q. You say on several occasions during the time that you were in the room with the defendant and the informer on the night of the 15th, or early morning of the 15th, that he went down into the lobby and made several phone calls, and then back to your room; is that correct? A. Yes.

Q. Did you have any conversation with the defendant after going to the lobby and after those phone calls? A. Yes.

Q. What was that conversation?

A. He told me he can't contact this party; as soon as he contacts this party this man will bring the can of opium to the hotel.

Q. Did you have a telephone in your room?

A. Yes.

Q. Did you have any conversation with the defendant as to using that telephone?

A. Well, he don't want to use the hotel phone, he wants to use a pay station phone.

Q. You say he didn't want to. Did you get that idea from a conversation you had with him?

(Testimony of Jacob Lieberman.)

A. Yes; he told me that, himself.

Q. To the best of your recollection tell us that conversation that you had about the use of the phone. [61]

A. Well, I told him to "use my phone over here." He said, "No, I don't want to use your phone, Jack; I want to go downstairs to the lobby, there is a pay station, and use the phone down there." I went down there with him. While he was phoning I went to get a package of cigarettes in the slot machine in the lobby. I waited for him to come out of the pay station. Then we both went upstairs to the room.

Q. Tell me, you stated that you haven't had any opium in your possession since that time, you have had heroin. Was that in connection with other cases that you have been working on in your employment?

Mr. Duane: Just a minute. We will object to that as incompetent, irrelevant, and immaterial.

The Witness: A. Yes.

The Court: Overruled.

Mr. Davis: Q. Was it or was it not in connection with Government cases that you were working on?

A. That was in connection with Government cases; that is the only time I ever bought any drugs, was for the Government only.

Mr. Davis: That is all.

(Testimony of Jacob Lieberman.)

Recross-Examination

Mr. Duane: Q. By the way, this matter of the sale of this can that you have told us about, who suggested that sale, do you know? [62]

Mr. Davis: I object to the words "who suggested the sale." I have no objection to the conversation that took place in which the sale arose, but I think the use of the word "suggested" is leading.

Mr. Duane: I think maybe you are right on that.

Q. Were you present at any conversation wherein the defendant engaged with reference to the sale of a can of opium? A. Yes.

Q. Tell us about it.

A. The informer asked Steve Sorrentino to sell him a can of opium.

Q. Yes.

A. Steve told him, "I will bring one" the following day to the hotel, around eleven o'clock at night.

Q. So that the informer asked him to get it?

A. Yes.

Q. Is that right? A. Yes.

Q. Did Sorrentino say he didn't have it, or he would have to get it somewhere, or something of that kind?

A. He said he has got it but he is going to get in contact with somebody who has got it put away for him.

(Testimony of Jacob Lieberman.)

Q. He has to get it from somebody who had it put away for him? A. That's right.

Q. When did this conversation take place? [63]

A. That was around, I think, the 15th of August.

Q. Around the 15th of August? A. Yes.

Q. Well, was it on the 15th of August?

A. Yes, sir.

Q. What time of the day?

A. Well—I would say it was around, let me see. I'll tell you when—this started off around 10 p. m. August 14th. He was supposed to bring it August 15th around eleven o'clock at night to the hotel.

Q. The conversation of the 14th—

A. Yes, but we were there for several conversations.

Q. Let's confine ourselves to the conversation now which was on the 14th of August.

A. That's right.

Q. Where? A. 303, that is my room.

Q. In your room? A. Yes.

Q. You were present and the man you refer to as the informer was present? A. Yes.

Q. And the defendant?

A. Yes. They were smoking in my room.

Q. They were smoking in your room? [64]

A. Yes.

Q. Of course, you were not smoking?

A. No, sir.

Q. Then the informer asked the defendant to sell him a can of opium? A. Yes.

(Testimony of Jacob Lieberman.)

Q. Is that right? A. Yes.

Q. What did the defendant say?

A. "I'll bring a can over" the following day,
to the hotel.

Q. "I'll bring a can over" the following day?

A. Yes.

Q. That is what he said? A. Yes.

Q. "I'll bring you a can" the following day?

A. Yes, "At eleven o'clock."

Q. "At eleven o'clock?" A. Yes.

Q. Are you using his words now?

A. Well, I am trying to quote some of the words.
I mean I am not positive of those particular words.
I know he was supposed to bring one the following
day.

Q. At eleven o'clock? A. Yes.

Q. At night? A. Yes. [65]

Q. That would be the 15th?

A. 15th, that is correct.

Q. Did you see him between the time this conversation took place and eleven o'clock on the 15th, at that time, eleven o'clock that night?

A. The conversation took place, I would say about three, or four, or five in the morning. He left probably about five o'clock in the morning.

Q. Say about four—let's say five in the morning. Did you see him from five in the morning, between five in the morning and eleven o'clock at night?

A. No.

Q. You did not see him at all? A. No.

(Testimony of Jacob Lieberman.)

Q. But he came in at eleven o'clock and you were in the lobby? A. Yes.

Q. And he didn't have a can then?

A. I don't know whether he had a can with him, or not, but I found out later on he didn't have a can.

Q. It was after that and the same night, or, rather, the early morning of the next day that he was up in your room?

A. Yes. We sat in the room up until seven o'clock in the morning.

Q. It was on that same day, August 16th, that he arrived with the can? A. Yes, sir. [66]

Q. So that we get it all now in sequence, the informer asked him to get him a can of opium?

A. Yes.

Q. Is that right? A. Yes.

Q. Can you relate, or can you tell us what the defendant said in response to that?

Mr. Davis: If the Court please, I object. This questions has been asked and answered, to my knowledge, about five times.

The Court: I think you are going over the same ground, Counsel. I always like to allow wide latitude on cross-examination, but I think you asked him these same questions several times.

Mr. Duane: Well, I don't think he has answered. I don't think I asked that particular question. However, if the Court says I have——

The Court: Well, if there is any doubt in your mind about it, I will allow you to ask the question,

(Testimony of Jacob Lieberman.)

but the question and answer has been given several times. I could repeat it to you, but maybe you did not hear it. If there is any doubt about it you may ask it.

Mr. Duane: I will be guided by what your Honor says. We will let it go.

Q. Who carried the can of opium from the house on Forty-fifth Avenue to Agent Grady? [67]

A. The informer.

Q. The informer. You did not carry it at all?

A. No.

Q. So that all this activity was between the defendant and the informer, and you were an observer? A. Steve knew——

Q. Well, forget about what Steve knew. Answer the question.

The Witness: What was the question, please?

Mr. Duane: May the question be read?

(The question was read by the reporter.)

The Witness: A. No; part of that deal was my deal, also.

Mr. Duane: Q. Well, could you tell——

A. The informer knew it was mine; I was always on the deal.

Q. Tell us how you were in on the deal?

A. Well, I was afraid that Stephen Sorrentino will say "No" to me if I asked him that particular question myself, because I was not at that particular time very, very close with him; the informer was very, very close with him, so I didn't want to ask him, but I told the informer to ask him, himself,

(Testimony of Jacob Lieberman.)

“He will give it to you quicker than he will give it to me.” Therefore, he asked him that question.

Q. You felt you didn’t know him well enough?

A. Well, I know him all right, but I was afraid of that “No.” That is all.

Q. However, the informer asked him in your presence? [68] A. Yes.

Q. He spoke out loud so you could hear it?

A. Yes.

Q. And the defendant answered?

A. Yes.

Q. Is that right? A. Yes.

Mr. Duane: That is all.

Mr. Davis: That is all.

The Government rests, your Honor.

Government rests.

The Court: Mr. Duane, the Government has rested. Do you prefer to have the recess now before you go on?

Mr. Duane: I would like to, your Honor.

The Court: We will take the afternoon recess now. Ladies and gentlemen, please bear in mind the admonition the court has heretofore given you.

(Recess.)

The Court: You may proceed.

(Opening statement made on behalf of the defendant.)

Mr. Duane: I would like to call a couple of witnesses out of order at this time, pursuant to arrangement with counsel.

JOSEPHINE PRIEST,

called as a witness on behalf of defendant; sworn.

The Clerk: Will you state your name to the court and jury? [69] A. Josephine Priest.

Direct Examination

Mr. Duane: Q. Where do you reside, Mrs. Priest?

A. With my daughter and her husband, Mr. Sorrentino.

Q. Where?

A. 2619 Thirty-eighth Avenue.

Q. San Francisco? A. Yes.

Q. How long have you lived there?

A. It will be five years on the 23rd of February.

Q. You have been living there continuously?

A. Yes.

Q. For that period; is that so? A. Yes.

Q. You are at home there every day?

A. Yes, sir.

Q. Mrs. Priest, during the time that you have been living in that house, how many times have narcotic agents called there?

A. Three times.

Q. Three times. Did they engage in any activities while they were there?

A. Well, they searched the house and one man walked up and hit Stevey right in the face.

Q. They searched the house on each occasion?

A. Yes, they did. [70]

Q. Went all through the house?

A. Yes; even my rooms.

(Testimony of Josephine Priest.)

Q. And into your room? A. Yes.

Q. In every room?

A. Yes, and the basement.

Q. On one occasion you say one of the agents struck your son-in-law?

A. Yes; Mr. McGuire.

Q. What? A. Mr. McGuire.

Q. Were they in everybody's presence at that time? A. Yes.

Q. On any occasion that they searched that house did they find anything that they took away with them, any narcotics? A. No.

Q. Do you know whether any agents of the narcotics division dug up your garden in the back of the house? A. No.

Q. They didn't do that. I think that is all.

Cross-Examination

Mr. Davis: Q. Mrs. Priest, how long have you known the defendant?

A. Oh, about eight years.

Q. Eight years. When was he married to your daughter? [71]

A. Five years this January.

Q. Then do I understand you, Madam, that during the last five years you have resided with him and your daughter in their home? A. Yes.

Q. You say that on three occasions narcotics agents came to your or to his house, is that correct?

A. Yes.

Q. Can you tell me about when the first time—withdraw that.

(Testimony of Josephine Priest.)

A. Well, the first time there was a soldier wanted to go back East, and they had agreed to lend him some money to go back on. He came out to the house and he brought a blanket and his jacket and he said, "I'll leave there here"—

Q. Just a moment. I don't think you are answering my question. Can you tell me the first time? What year was it?

A. It was the first year we were there. That would be five years ago this coming spring, I believe.

Q. Then it would be probably in 1942; is that correct?

A. I think it would be.

Q. Who were there on that occasion, if you can recall?

A. Mr. McGuire was the only one I knew, and then there was the U. S. Marshal, but I don't know what his name was.

Q. There was a marshal?

A. There was four men, I believe, at that time.

Q. How did you know they were narcotics agents?

A. I don't know. They had a warrant. He said he was the U. S. [72] Marshal.

Q. Do you know whether there was a U. S. Marshal there, or not?

A. Yes. One was a U. S. Marshal because he showed me his credentials before I opened the door for him.

Q. Well, there was a U. S. Marshal there and he had a warrant?

A. Yes.

(Testimony of Josephine Priest.)

Q. What was the warrant for, do you know?

A. To search the house.

Q. Was it for anything else?

A. Well, I believe that was the time they were searching the house for Government goods that someone told them the house was full of.

Q. Wasn't it, in fact, a warrant of arrest for Mr. Sorrentino, the defendant Steve Sorrentino, rather than a search warrant?

A. No. They had a search warrant. At least, that is what he told me it was.

Q. That was served by the U. S. Marshal. Who else was in the house at the time?

A. There was my daughter.

Q. Was the defendant there? A. Yes.

Q. When you say that narcotics agents came there three times, at least on this one occasion you are basing that statement on the fact that Mr. McGuire was with the Marshal; is that correct?

A. Yes. [73]

Q. There were two or four other men. You don't know who they were?

A. No, I didn't know them.

Q. That is the first occasion. When was the next occasion after that?

A. Well, I don't know. It might have been another year; I don't remember.

Q. Would you say it was more than a year later or less than a year, or about a year?

A. I imagine it was around about a year.

Q. Who came on that occasion?

(Testimony of Josephine Priest.)

A. Well, McGuire was there that time.

Q. Who else?

A. If I remember right, but I don't know who the rest of them were. He is the only one we knew.

Q. Did they tell you they were narcotics agents?

A. Yes.

Q. Did they have a search warrant then?

A. Yes.

Q. They searched the premises; is that correct?

A. Yes.

Q. They didn't find any narcotics?

A. No.

Q. You are sure they were looking for narcotics on that occasion? [74]

A. Well, I asked them, I said, "What are you searching my room for?" He said, "Ask Stevey."

Q. You say on the first occasion, however, they were looking for some Government property that was supposed to be there?

A. Yes.

Q. When was the third occasion when they came?

A. I couldn't tell you what the date was. It was not very long. There were nine men came out.

Q. Well, we have once in 1942 and once about a year later in 1943. How much later after that was the third search?

A. Well, I don't remember.

Q. Would you say it was more than a year?

A. Possibly; might have been a year ago.

Q. Might have been a year ago?

(Testimony of Josephine Priest.)

A. Might have been that long; I don't remember. I never thought anything about the date.

Q. Well, we have once in 1942 and once about a year later in 1943. How much later after that was the third search?

A. Well, I don't remember.

Q. Would you say it was more than a year?

A. Possibly might have been a year ago.

Q. Might have been a year ago?

A. Might have been that long; I don't remember. I never thought anything about the date.

Q. You mean from what date it might have been a year later? [75]

A. No, it was not that long; it was no more than about eight months ago.

Q. Eight months from this date?

A. Yes, from now, back.

Q. Who came out that time?

A. This gentleman, here, was the only one I remember, this one, and the other gentleman sitting back there, I believe.

Q. What occurred then?

A. Well, they searched the house.

Q. Did they have a warrant at that time?

A. I don't think they had, but they told me they did have when I opened the door.

Q. By the way, was Steve there?

A. Yes. He was home in bed.

Q. Well, as a matter of fact, that was the day they arrested him on this charge, wasn't it?

A. Yes, I think it was.

(Testimony of Josephine Priest.)

Q. So we have them now at your house on three occasions when they were with a United States Marshal serving a search warrant for alleged stolen Government property, another time about a year ago when McGuire was there, you knew he was there? A. Yes.

Q. And then this last time when they arrested the defendant; is that correct? A. Yes. [76]

Q. You say they did not find any narcotics there? A. No.

Mr. Davis: That is all.

Redirect Examination

Mr. Duane: Q. Mrs. Priest, you have related now three occasions and you also have testified on your direct examination on one of your occasions the defendant was struck by one of the agents.

A. Yes, he was.

Q. On which one of those occasions?

A. The first time they were out.

Q. The first time? A. Yes.

Q. You think that was about in 1942; is that right?

A. I think so; possibly about three or four years ago.

Mr. Duane: That is all.

BERNARD REICHLING,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your name to the court and jury? A. Bernard Reichling.

Direct Examination

Mr. Duane: Q. Mr. Reichling, you are a member of the San Francisco Police Department? [77]

A. I am.

Q. Attached to the special service detail?

A. That's right.

Q. You have been a member of the Department for several years? A. I have.

Q. You know Thomas McGuire, a Federal narcotics agent, do you not? A. I do.

Q. You are familiar with the home of the defendant Sorrentino, here, in San Francisco, out on Thirty-ninth Avenue?

A. Well, I wouldn't say I was familiar with it. I was in it once.

Q. Can you tell us about when that was?

A. That was three or four years ago, I believe.

Q. Did you go there with Agent McGuire?

A. He was one of the officers.

Q. There were several other officers, were there not? A. Yes.

Q. Do you recall seeing this lady, Mrs. Priest, who was just on the stand?

A. Yes, she was there.

Q. On that occasion, the occasion of your visit, was that house searched?

A. Yes, it was searched.

(Testimony of Bernard Reichling.)

Q. Did you see Agent McGuire strike the defendant? [78]

A. I didn't see the actual blow. I will have to go into a little description of this. As you enter the door, as I recall, the living room was a little bit to the left. You come to the living room. I believe you go through a sort of arch into a little center hallway. In that hall was either a linen closet or stairway going downstairs. At the time I turned away from McGuire and Sorrentino I turned around, I was either going to open the door to go downstairs or to search the linen closet, and Sorrentino was standing and McGuire was talking to him, and the words got kind of loud, and I turned around as Correntino said, "You don't have to do that." But at that time he was then sitting in a chesterfield. I think he had a robe, bathrobe on.

Q. He was sitting on a chesterfield?

A. The last time I saw them they were standing up and there was a little argument going on. I was searching, was going to go downstairs, and then when I turned back again, why, Sorrentino was sitting in the chesterfield, and he said, "You don't have to do that."

Q. Did he have his hand up to his face?

A. I don't recollect. I assumed that he was hit. I was right there within ten feet, but I didn't see what actually took place.

Q. On that occasion there was narcotics or anything of that kind found as a result of the search?

(Testimony of Bernard Reichling.)

A. No, I don't think there was, no.

Mr. Duane: That is all.

Cross Examination

Mr. Davis: Q. How long have you been in the Police Department? A. About 16 years.

Q. For a long part of that time you were assigned to the narcotics division of the Federal Government as assisting from the police department?

A. Well, it has been eleven years, between the State and the Federal Bureaus. I was there on the Federal Bureau for sometime.

Q. It is a fact, is it not, that the San Francisco Police Department makes a practice of assigning one or two of its officers to each one of the governmental enforcement agencies to assist?

A. They did up until the shortage of men, and I was called off the detail on October 23, 1944.

Q. Directing your attention to this time that you went out to the Sorrentino home, who, to the best of your recollection, was with you at that time?

A. Well, there was Narcotics Agent Tom McGuire, and there was a deputy United States marshal; I believe it was Warren Cain, and I believe there was an FBI man, a man from the Federal Bureau of Investigation, I believe he was there also. I don't know who he was. As I recall, there were four of them. One [80] was from the FBI, and the Marshal's office, and I was from the Police Department, and McGuire from the Narcotics Bureau.

(Testimony of Bernard Reichling.)

Q. Do you know whether or not the marshal had a warrant at that time? A. He did.

Q. Do you know whether or not it was a warrant for the arrest of the defendant, or a search warrant?

A. I am not sure of that. I knew he had a search warrant. We took Sorrentino with us. I don't remember whether we actually had a warrant of arrest.

Q. Do you know what was the purpose of your going out there?

A. It was regarding stolen Government goods, or the receiving of stolen goods.

Q. You say that you did not find any narcotics when you made the search; is that correct?

A. Not that I recall. I don't believe that there was.

Q. As a matter of fact, you weren't going out there for the specific purpose of searching the property for narcotics, were you?

A. Well, I was searching it for anything I could find, stolen goods and narcotics.

Q. But the actual purpose of that particular visit was because there was suspicion that there was stolen Government property in the premises?

A. That's right. [81]

Q. Did you find any Government property in the premises? A. I did not.

Q. Did anyone else, to your knowledge?

A. Well, to the best of my knowledge or remembrance, I believe a blanket and one of these field jackets like an Eisenhower jacket; I am not very

(Testimony of Bernard Reichling.)

clear on that, either, because I only went out to help them search the place. I didn't work on the case, nor did I follow it up. Just that one day that I went out there.

Q. This incident where Agent McGuire is supposed to have struck the defendant, you, of course, as you testified, of your own knowledge did not see McGuire actually strike him, did you?

A. No, I did not.

Q. But you feel from the tenor of the conversation which took place after that that he had struck him?

A. Yes, that is what caused me to turn around. I thought that trouble was going to start.

Q. Did you know anything that led up to that blow, if it was struck, or any subject of conversation that gave you an inkling as to why it might have taken place?

A. Well, the boys were getting loud, and, as I recall it, Mr. McGuire told Sorrentino to take his hand out of his pocket, and then the next thing I turned around and heard Sorrentino say, "You don't have to do that," and he was sitting on [82] the chesterfield.

Mr. Davis: That is all.

Redirect Examination

Mr. Duane: Q. Mr. Reichling, do you know whether any Government property was found at Sorrentino's house that was stolen property?

A. I am not clear on that, but I understand that there was a jacket, or some blanket.

(Testimony of Bernard Reichling.)

Q. Well, isn't it a fact that that jacket belonged to a soldier who had been at the house?

Mr. Davis: I object to that.

Mr. Duane: I am asking if he knows.

The Witness: I don't know.

Mr. Duane: Q. You don't know?

A. No.

Mr. Duane: That is all.

GEORGIA BECKWITH

called as a witness on behalf of defendant; sworn.

The Clerk: Will you state your name?

A. Georgia Beckwith.

Direct Examination

Mr. Duane: Q. Where do you reside, Mrs. Beckwith?

A. 4684 Fair Avenue, Oakland.

Q. You are the wife of Ward Beckwith? [83]

A. Yes.

Q. You are the sister-in-law of the defendant?

A. Yes.

Q. How long have you been living in Oakland?

A. Well, we bought a home there five years ago.

We have been there about seven and a half years.

Q. While you were living in Oakland were you visited by narcotics agents? A. Yes, I was.

Q. Mr. McGuire and some other men?

A. I didn't know their names.

Q. You didn't know their names? A. No.

Q. Can you tell us when that was, approximately?

(Testimony of Georgia Beckwith.)

A. That was five years ago, in the summer. It was around August, September; I don't remember.

Q. Five years ago in August or September?

A. Yes.

Q. Did these agents tell you what the purpose of their visit was?

A. No, they did not.

Q. Did you have some conversation with them?

A. Yes. They came in and asked me who I was, and if I had known Stevey and my sister. I said yes.

Q. Will you speak up, please? [84]

A. They asked me——

Q. Did they say anything about Steve Sorrentino to you?

A. They asked me if I knew anything about him being at the river. I said yes, I had been up there for two weeks.

Q. By the way, did the defendant have a place up on the Russian River?

A. Yes, he had a cottage.

Q. At that time? A. Yes.

Q. You had been up there with your children?

A. Yes.

Q. Do you recall anything else they said to you?

A. Asked if I knew other people who had been up there. I told them no, I did not.

Q. Well, did they say anything to you about Steve?

A. Well, all they asked me was about the people that came up to see him.

(Testimony of Georgia Beckwith.)

Q. Well, did they ask you if you knew he was dealing in narcotics?

Mr. Davis: I am going to object, your Honor. I have not so far, but counsel's questions are leading.

Mr. Duane: All right, your Honor. I will withdraw it.

Q. Did they say anything else to you?

A. Well, they asked me questions about what he did. I told them I didn't know. [85]

Q. Is there anything else you can recall?

A. No.

Mr. Duane: All right. That is all.

Mr. Davis: That is all. No questions.

WARD BECKWITH

called as a witness on behalf of the defendant; sworn.

The Clerk: Will you state your name to the court and jury?

A. Ward Beckwith.

Direct Examination

Mr. Duane: Q. Where do you reside, Mr. Beckwith?

A. 4684 Fair Avenue.

Q. Oakland? A. Yes.

Q. What is your occupation?

A. I am a marine engineer at the American Bureau of Shipping.

(Testimony of Ward Beckwith.)

Q. And you have been for sometime?

A. Yes.

Q. You are the husband of Georgia, this lady who was just on the stand? A. Yes.

Q. Let me ask you if you were visited by agents of the Narcotics Division at any time.

A. Yes, sir. I was over here in the California Hotel from June, July and August in 1942, 1941, and one afternoon—I was [86] superintendent of construction at Moore's Shipyard at that time, and in the afternoon, I came home about 1:30 that afternoon, and there was a note in my box. It said, "We would like to see you." I looked over in the corner and there were two gentlemen there in the corner. They motioned to me. I went over and I asked them what they wanted, and they said they would like to talk to me, and if I objected. I said No. I said, "Would you like to come up to the room?" They decided to sit in the lobby. So they sat there. They asked me what I did. I told them. They said, "Well, we know what you do, we have checked on you." I said, "Well, what is this for?" Then they said, "Do you know Steve Sorrentino?" I said, "Yes, he is my brother-in-law."

They said, "Have you ever been into his home?"

I said, "Several times we have been over there for dinner and they have been out at our place."

They said, "Have you ever been to his place on the Russian River?"

I said, "Yes," I had, that I had spent a week end up there not too long ago, and they asked me if I

(Testimony of Ward Beckwith.)

knew anyone up there. I said, "Well, I couldn't remember the name, but there was a man and a blonde lady, plus my wife and three children, and I had taken Jerry Cornett, a friend of mine, and his wife with me, and we spent the week end and came back. They asked me if I saw anything funny going on. I asked him what he meant. [87] He said, "We are just checking up. We know you are telling the truth, because we have checked on you and we know what you do, and we know why you are separated from your wife." I said, "Well, I am not separated from my wife," and I straightened them out on that. They were very courteous to me all the time we had our conversation, and I answered the questions, and told them if I could help them at any time I would be glad to. That is the best of the conversation that I remember.

Q. Was anything said by either of those men with reference to the defendant and narcotics?

A. No, the word "narcotics" was never brought into the conversation. They asked me what Steve did. I told them that I didn't know, that our acquaintance was merely formalities of Christmas or birthdays, or something such as that. They were very pointed, asking me about friends. They said, "We know where Steve is, we know everything he is doing, but we are checking on"—then they mentioned a name that I could not remember now even if it was mentioned to me, but that was the gist of the conversation while we sat there.

Mr. Duane: That is all.

(Testimony of Ward Beckwith.)

Mr. Davis: No questions.

Mr. Duane: That is as far as I can go today, if the Court please.

The Court: You will have your other witnesses here in the morning? [88]

Mr. Duane: Yes, your Honor, I will.

The Court: Ladies and gentlemen: It appears that two witnesses who have been subpoenaed by the defense have failed to appear, appear, and it will be necessary for us to take an adjournment until tomorrow morning. I understand that the evidence will be finished and the case submitted to the jury tomorrow, so there won't be any lost motion by reason of the fact we are adjourning somewhat earlier today. We will resume the case tomorrow morning at ten o'clock. The jury will return at that time. In the meantime, please still keep in mind that it is your duty not to discuss this case among yourselves or anybody else, nor are you to form or express any opinion concerning the case until it is finally submitted to you for decision. You may be excused until tomorrow morning at ten o'clock.

(An adjournment was thereupon taken until tomorrow, Wednesday, January 15, 1947, at ten o'clock a.m.) [89]

Wednesday, January 15, 1947, 10:00 o'clock a. m.

The Court: The jurors are all present. You may proceed.

ISADORE CHIERNEY

called as a witness on behalf of defendant; sworn.

The Clerk: Will you state your name to the court and jury?

A. Isadore Chierney.

Direct Examination

Mr. Duane: Q. Will you speak up so the jury can hear you? What is your occupation?

A. I work at the Uptown Hotel, houseman.

Q. What? A. Houseman.

Q. As such houseman, are you familiar with the rooms in the basement of that hotel which are known as the tool room—— A. Yes.

Q. And the dark room?

A. Well, the tool room is the room that I work in.

Q. There is a door that leads from the tool room to the dark room? A. Yes, there is.

Q. Can you go through that door?

A. No. That door was locked. There is a padlock on it. [90]

Q. That is from the——

A. From the tool room to the dark room.

Q. From the tool room to the dark room?

A. Yes.

Q. Was there anything else on that door on the tool room side?

A. Yes, there was a bench right in the doorway, 36 inches wide.

Q. Across the doorway?

(Testimony of Isadore Chierney.)

A. Across the doorway, and a shelf on top of the bench.

Q. Across the panel of the door? A. Yes.

Q. There was a shelf? A. Yes.

Q. Do you know the contents of that shelf?

A. Yes, tools and supplies that I use for the hotel.

Q. Let me ask you if there are any nail holes in the panel of that door.

A. Well, there was a few nails in there, but there were no holes in there.

Q. There were some nails stuck in there?

A. Yes.

Q. But no holes that went right through?

A. No holes in the panel, no.

Q. When was the last time you looked at that door?

A. Well, I go in there every day.

Q. When was the last time you looked at it? [91]

A. Well, the other day, I think it was Monday.

Q. Wasn't it yesterday? A. Yes.

Q. I was there with you? A. Yes.

Mr. Duane: That is all.

Cross-Examination

Mr. Davis: Q: Mr. Chierney, how long have you been employed at the Uptown Hotel?

A. One year and a month.

Q. What? A. One year and a month.

Q. Four—

A. No. One year and one month.

(Testimony of Isadore Chierney.)

Q. One year and one month?

A. That's right.

Q. You were not employed there on August 16, 1945, were you? A. No, I was not.

Mr. Davis: That is all.

Redirect Examination

Mr. Duane: Q. Mr. Chierney, when you went there to work——

A. That's right.

Q. The tool room was there, wasn't it?

A. Yes.

Q. The dark room was there? [92]

A. Yes.

Q. The bench and the shelf were there?

A. That's right.

Q. And there were no holes in the door?

A. I never seen any holes in the door.

Q. Since you have been there the hotel has been renovated, has it not?

A. That's right.

Q. But the same doors are on there?

A. The same door is on there.

Mr. Daune: That is all.

Recross-Examination

Mr. Davis: Q. When you say the same door, obviously you mean the same door is there now that was there when you first went to work?

A. Yes.

Q. One year and one month ago. A. Yes.

(Testimony of Isadore Chierney.)

Q. You don't know anything about what was there before? A. No, I don't.

Mr. Davis: All right.

Further Redirect Examination

Mr. Duane: Q. By the way, let me ask you this: The door from the outside leading into the tool room, and the door from the outside leading into the dark room, are they both on [93] the same wall? Do they run in together, run along together, one next to each other?

A. No, it is about ten feet away from one to the other, I believe.

Q. And around a corner? A. Yes.

Q. As a matter of fact, the door to the tool room is on one hallway? A. Yes.

Q. And the door to the dark room is around the corner? A. Around the corner.

Q. On the other side?

A. On the other side, yes.

Q. Let me ask you this: About how far from the door to the pool room is the staircase leading downstairs.

A. Oh, I believe it is about 15 feet, 15 to 18 feet.

Q. Can you give the jury some idea of the position of that staircase as regards the door? Is it directly behind the door or is it ahead of it, or on the side?

A. It is, well, it would be on the side, on the other side of the——

Q. It is beyond the hallway?

(Testimony of Isadore Chierney.)

A. Yes, beyond the hallway.

Mr. Duane: That is all.

Mr. Davis: That is all. [94]

STEPHEN SORRENTINO

the defendant, called in his own behalf; sworn.

The Clerk: Will you state your name to the court and jury?

A. Stephen Sorrentino.

Direct Examination

Mr. Duane: Q. You are the defendant here?

A. Yes.

Q. Where do you live?

A. 2619 Thirty-eighth Avenue.

Q. You are a married man? A. Yes.

Q. You live at that address with your wife and your mother-in-law? A. Yes.

Q. You are buying that home, are you?

A. Yes.

Q. Do you know a man by the name of Jerome Berry? A. Yes.

Q. Do you know the man who was here yesterday, testified yesterday, by the name of Lieberman?

A. Well, I have seen Mr. Lieberman; I have seen him.

Q. Well, you talked with him, haven't you?

A. Yes.

(Testimony of Stephen Sorrentino.)

Q. Did you know him under the name of Lieberman?
A. No.

Q. What name did you know him by? [95]

A. Mandel.

Q. Can you tell us approximately when you first met him?

A. Well, I couldn't say when I first met him, but this Berry, he had come with a group of fellows that last summer and rented my boat.

Q. Just a minute. I want to get to Lieberman. Have you any idea when you first met him?

A. Well, it must have been around the end of 1945, sometime.

Q. You heard his testimony. He says he met you on the 8th of August, 1945.

A. He probably did.

Q. That is about right?

A. Probably right.

Q. Prior to that time you had met Berry?

A. Yes, on several occasions.

Q. How did you meet Berry and him?

A. Well, I run a party boat for fishing. I take fishing parties out, and he came with a group of people, and there was a fish run up in Martinez, and he came up several times; I had taken his party out.

Q. Did Berry have a camera?
A. Yes.

Q. I will show you a photostat and I will ask you if you ever saw that before.

A. Yes. This is taken on my boat.

Mr. Davis: I am going to object unless Mr.

(Testimony of Stephen Sorrentino.)

Duane makes [96] an offer of proof. There must be some reason to show why the introduction of this photograph is not incompetent, irrelevant, and immaterial.

Mr. Duane: What?

Mr. Davis: I say I will object to any question about that photograph now unless there is some offer of proof to indicate whether it is going to be competent, or material.

Mr. Duane: All right. I will withdraw it, then.

Q. I will show you the photograph and ask if you ever saw that before.

A. Yes. That is Jerome Berry. That is not his wife, but another woman.

Q. But that is Berry? A. Yes.

Q. Was that picture taken on your boat?

A. No; on the float going to the boat at Martinez.

Mr. Duane: We will offer this for identification.

Mr. Davis: I really don't know what the purpose is, your Honor. If I knew I might be in a position either to object or not to object. So far the picture of Jerome Berry is just being offered for identification. What are you trying to do?

Mr. Duane: Well, it is only for identification. When we get to the point of putting it into evidence then I will make my showing.

The Court: All right. Let it be marked for identification. [97]

(The photograph was marked Defendant's Exhibit B for identification.)

(Testimony of Stephen Sorrentino.)

Mr. Duane: Q. When was this photograph taken?

A. It must have been around June of 1945.

Q. June of 1945? A. Yes.

Q. Did you meet him on several occasions?

A. Yes, quite a few times.

Q. Did you ever visit Berry at the Uptown Hotel?

A. Yes. I used to keep my fish in the icebox at the Uptown Hotel.

Q. Under what circumstances did you meet Mandel, or Lieberman?

A. Well, I seen Mr. Lieberman a couple of times around that hotel and I came in, up in Jimmy Berry's room, and this Mr. Mandel he had a room next door, so I used to come in there to go up and see Berry once in a while, and that is how I happened to meet him.

Q. The door between the two rooms was kept open, was it not?

A. All the time, yes.

Q. Did you ever have any conversation with Lieberman, or with Berry, in the presence of Lieberman, with reference to narcotics?

A. No, sir.

Q. Let me ask you if you ever smoked opium up in either Mandel's room or Berry's room? [98]

A. No. I never smoked opium up there. That is why I left that hotel, because I seen it smoked up there, right in Mr. Mandel's room, and that is why I got away from there.

(Testimony of Stephen Sorrentino.)

Q. About when was that, when did you get away from there?

A. Well, that must have been around August, sometime.

Q. Of what year, 1945? A. 1945.

Q. You have not been back there since?

A. No.

Q. You have not gone to that hotel since?

A. Well, I have been back once or twice, or something, but that is after he had been out of it.

Q. Since Berry has been out of there?

A. Yes.

Q. By the way, Berry worked for that hotel, didn't he?

A. Well, he was supposed to have been the clerk there, or something. He had the run of it, anyway.

Q. You have been convicted of a felony?

A. Yes.

Q. Drawing your attention now to the 15th of August, 1945, were you in Berry's room on that day? A. No, I don't think so.

Q. Don't say—don't give us what you think. If you know.

A. No. I was not there. I was not in Berry's room that day. I had got a phone call from Berry at my house to go to his house [99] on Forty-fifth Avenue, and I went there.

Q. I am talking about the day before that, the 15th. Were you in the Uptown Hotel on that day?

A. No, I was not there the day before.

Q. You are sure of that?

(Testimony of Stephen Sorrentino.)

A. I am positive of that.

Q. Let me ask you if you were there in this dark room in the basement of the Uptown Hotel.

A. Yes, lots of times.

Q. You were in there many times?

A. Yes.

Q. What was in that room?

A. Well, it was a regular dark room. He had basins and things to develop pictures. He had camera film.

Q. By the way, when you were in that room, do you know where the door was located that leads into the tool room? You know where that door was on the wall?

A. Yes.

Q. Do you?

A. The one that you go into the dark room?

Q. No. The door that leads from the dark room to the tool room.

A. Yes.

Q. Let me ask you if there was anything hanging in front of that door on the dark room side.

A. Well, there was one of them—it was a closet, like, that [100] came down and had shelves on it.

Q. You mean a cabinet?

A. A cabinet.

Q. That was on the door?

A. Right on the door. It was right over the door, yes.

Q. On August 16th you say you did go to the Berry house?

A. Yes.

Q. Was that along about five o'clock in the afternoon?

A. Well, I know it was in the afternoon, sometime; I wouldn't say it was five o'clock.

(Testimony of Stephen Sorrentino.)

Q. When you went there did you have anything on your person in the way of a can?

A. No, sir.

Q. Let me show you this can, Government's Exhibit No. 1. I will ask you if you had that can in your possession when you went to that house.

A. No, I never had it, no.

Q. Did you ever have that can in your possession?

A. I never seen that can before.

Q. How long were you in Berry's house that day?

A. Well, he called me up, he borrowed a camera from a friend of mine, which he has still got and has not returned yet, and the camera is an expensive camera. I was trying to get the camera back; that is what I was trying to do that day, and he kept stalling me, and kept stalling me. He showed me [101] a—he was showing me a tripod or something that he was going to put this camera up on. That is what he showed me.

Q. When you went to that house that day was Lieberman there?

A. Well, he came in; he came in after I had been there. I was talking to Mrs. Berry. She was there, and we were in there talking in the kitchen, and he came in, this Mandel came in.

Q. Did you leave the house before Lieberman left there?

A. Oh, yes, yes. I was just there about, I don't know how long, about a half hour, and I left.

(Testimony of Stephen Sorrentino.)

Q. Was any money given to you in that house that day? A. No, sir.

Q. You know several of the narcotic agents, don't you? A. I do.

Q. They have been paying visits to your house; is that ight? A. Quite a bit, yes.

Q. How many times have they visited your house out there on Thirty-eighth?

A. Well, four—three times out here and they got me run out of about three or four apartments here. They used to come in when I wouldn't even be there, my wife, to the place on Filbert Street, they went and told them my wife was a narcotic user, and the manager of the house, well, naturally, she was very nice about it, but they told us to move, and I had all that trouble until I got this home.

Q. Have they visited your home?

A. Yes. [102]

Q. You say three times? A. Yes.

Q. Searched it each time? A. Every time.

Q. Do you know whether or not narcotic agents stationed themselves on adjoining houses to watch your house with spy glasses?

A. Well, I heard that.

Q. Of course, you don't know of your own knowledge? A. No.

Q. Were you struck? A. Yes.

Q. By any narcotics agent? A. Yes.

Q. In your home?

A. Right in the presence of everybody. It didn't

(Testimony of Stephen Sorrentino.)

make any difference; there were four or five people there.

Q. Have you been followed on the street?

A. Yes, quite a bit. The last six or seven years I have been followed and followed, and continually followed all the time.

Mr. Duane: I think that is all.

Cross-Examination

Mr. Davis: Q. What is your occupation?

A. I run a boat for fishing parties.

Q. How long have you been engaged in that occupation?

A. That is since I quit the shipyard. [103]

Q. When was that?

A. About three, about four years, three or four years.

Q. How long did you work in the shipyard?

A. Oh, about three or four months, until I couldn't work there no more, until I was supposed to be peddling narcotics over there, so I got out of there.

Q. Let's see. You say you quit the shipyard three or four years ago.

A. In 1943, sometime.

Q. Since then have you followed this fishing boat? A. Yes.

Q. That is your sole means of livelihood?

A. No, not exactly. I am interested in a hotel.

Q. What hotel? A. The Vernon.

Q. The Vernon Hotel. Where is that?

(Testimony of Stephen Sorrentino.)

A. On Mason Street.

Q. Where? A. Mason and O'Farrell.

Q. You own an interest in that?

A. Well, I did, but it is sold now.

Q. Where did you operate the fishing boat?

A. Up at Martinez, China Camp, Pittsburg, San Francisco. It is out in Hunters Point right now. [104]

Q. You say you worked in the shipyard three or four months? A. Approximately.

Q. What did you do before that?

A. Well, I made a couple of trips to sea; I drove truck around here.

Q. What were you doing in the month of August, 1945?

A. I was running a fish boat, I was taking out parties.

Q. You say you never smoked opium in the room, in any room in the Uptown Hotel; is that correct? A. No, sir.

Q. You have never had any opium in your possession, is that correct? A. Never.

Q. Did you say you—do you recall whether or not you were in the tool room on August 15, 1945?

A. If I was in the tool room?

Q. Yes. A. No.

Q. Were you ever in the tool room about that time of—the dark room, rather—were you in the dark room on that day?

A. No, I don't believe I was. I don't know what date I was in there. I have been in the dark room

(Testimony of Stephen Sorrentino.)

eight or ten times but if it was that day or not, I don't know.

Q. Isn't it a fact that you were in that dark room about that time and had a conversation with a man there, and he asked you [105] if you brought the can of mud, and you said, "No, I will bring it tomorrow"?

A. That is strictly out, no, I did not.

Q. You never had such a conversation?

A. No, I didn't.

Q. Isn't it a fact the man asked you if you wanted the money for it and you said, "No, I will get the money when I deliver it," the next day?

A. That is not right, no.

Q. But you do recall that on or about August 16th you went to a house out on Forty-fifth Avenue?

A. Yes.

Q. And that Lieberman, the man you knew as Mandel, was out there?

A. Jerome Berry, Mrs. Berry and Mandel was there.

Q. Do I understand your testimony correctly, when I say that you were in the house with Mrs. Berry; is that correct?

A. Myself and Jerome Berry, we were there ten minutes or so before I seen Mandel.

Q. Lieberman or Mandel came in?

A. Yes, that was when he came in.

Q. Isn't it a fact that Lieberman and Berry went in the house when you came in?

A. I couldn't say that; I don't know. I don't know when he came in, because I even asked him,

(Testimony of Stephen Sorrentino.)

I said, "Where did he come from? [106] Who is—Where did this fellow come from?" So he must have been there.

Q. Didn't you know him?

A. Well, I knew him, yes, but I didn't know he was in the house.

Q. Where did he come from then?

A. I saw him walk in the kitchen about fifteen minutes after I was there, he came in the kitchen and we was in the kitchen having a cup of coffee when he came in.

Q. How long did you stay in the house?

A. About half an hour, because that is—I know that is all it is all it was, a half hour.

Q. This cabinet you say that was on the door of the tool room, when was that there——

Mr. Duane: Just a moment. The witness didn't say the tool room.

Mr. Davis: The dark room.

Mr. Duane: Yes.

The Witness: That was there all the time. Every time I went in there it was there.

Mr. Davis: Q. When was the last time you saw it?

A. Well, I don't think I went around there seeing—I don't think I seen Jimmy Berry after the night I seen what was going on in their rooms, I walked out of there. What date that was I don't know.

Q. Was it before or after you went out to this house on Fifteenth [107] Avenue, or Forty-fifth Avenue?

(Testimony of Stephen Sorrentino.)

A. That was after I went out to the house.

Q. You say that your house has been searched on at least three occasions, your present home?

A. Yes.

Q. You say as a result evidently of investigations being made by the narcotics agents you were forced to move from various apartments; is that correct?

A. That is correct.

Q. Also that you have been followed on numerous occasions?

A. Yes.

Q. It is a fact, is it not, that you have bragged to numerous of your friends that you could not be followed?

A. Well, no, I don't know if I have bragged like that. I know I was always being followed.

Q. You believe because people told you that agents were watching your home or because these people told you——

A. I didn't pay no attention to it. They could watch it. I never said nothing about it.

Q. You say on one occasion you were struck by a narcotics agent in your home?

A. That's right. My right eye was fractured?

Q. Who else was there at that time?

A. My mother-in-law and my wife, two narcotics officers and the FBI man and two marshals.

Q. That took place out in your present home?

A. That's correct.

Q. You say you were convicted of a felony. When was that?

A. 1931.

Q. What was the nature of the charge?

(Testimony of Stephen Sorrentino.)

A. Well, it was a narcotics charge.

Q. Narcotics. A. Yes.

Q. Is that a Federal or State offense?

A. Federal.

Q. Is that the only felony you have been convicted of?

A. No. I was convicted another time.

Q. When was that? A. 1934.

Q. What was that for?

A. For having a gun in a car.

Mr. Davis: That is all.

Mr. Duane: That is all. That is our case.

Defendant rests.

THOMAS E. McGUIRE

called as a witness on behalf of the Government in rebuttal; sworn.

The Clerk: Will you state your name to the court and jury?

A. Thomas E. McGuire.

Direct Examination

Mr. Davis: Q. Mr. McGuire, what is your occupation? [109]

A. Federal Narcotics Agent.

Q. How long have you been engaged in that occupation?

A. The past nineteen years.

Q. Do you know the defendant, Mr. Stephen Sorrentino? A. Yes.

(Testimony of Thomas E. McGuire.)

Q. Do you recall an occasion when you and the marshall and the FBI agent and the police officer, Reichling, of the San Francisco Police Department, went to the home of the defendant?

A. Yes, I do. I recall going there.

Q. What was your purpose in going there on that particular day?

Mr. Duane: Just a minute. I object to that as incompetent, irrelevant, and immaterial.

Mr. Davis: I am entitled to put it in, your Honor, in my opinion, because the defense has raised the point that this man was being bothered and his home was being searched for narcotics by the agents, the theory being that since this man got out of serving time on the last conviction of a felony that the agents have continued to disturb and annoy him, and would not leave him alone. I am entitled now on rebuttal to show why they were in the house, what they were doing, and if they have followed the man or done any of these things that are claimed, if they had probable cause or any reason to do it.

Mr. Duane: We submit the objection, if the Court please. The purpose of this witness certainly is not binding on the [110] defendant, nor is it relevant in this case.

The Court: I will overrule the objection.

Mr. Davis: Q. What was your purpose in going there on that day?

A. To assist in the arrest of the defendant, and serve a warrant of arrest.

(Testimony of Thomas E. McGuire.)

Q. Was there a warrant of arrest issued for the defendant? A. Yes, there had been.

Q. Do you know what the change was?

A. Receiving United States property.

Q. Did you make a search of the premises?

A. I made a search of the particular room in which we had placed the defendant under arrest, which, I believe he stated at that time, was his bedroom.

Q. Were you searching for narcotics at that time?

A. Narcotics was incidental, but any evidence that I could obtain, but if I could find narcotics I made an effort to find narcotics also.

Q. Did you strike the defendant on that day?

A. I wouldn't say I struck him. He refused to remove his hand from his pocket in which he had a piece of Kleenex, after I had told him—he knew me and I had introduced myself and identified myself as to who I was by the showing of my credentials to him. The United States Marshal had made known his identity and displayed the warrant to him, and told him he was under arrest. The defendant was angry, and he had [111] his fist or his hand doubled up in his pocket. I told him to remove his hand from his pocket and I wanted to take the piece of Kleenex; at that time I didn't know what was in the Kleenex, and I went to reach for it. In a belligerent manner and in a manner which indicated to me that he was going to resist; he attempted to withdraw away from me. I

(Testimony of Thomas E. McGuire.)

pushed, not a push, not very hard, but he sat down in the settee, or, at least, he dropped down in the settee and remained quiet thereafter.

Q. Were you ever present, do you know whether other agents made searches of his home?

A. The agents might have been assisting me while I was there. I believe that I took the foremost part in searching the particular person of the defendant at the time of the arrest. The other agents likewise were searching, but more or less with me.

Q. That is on the one occasion that you have described the defendant claimed that this was where he was living when they searched on the third occasion? Do you know anything about the other two?

A. I know, to the best of my recollection, the year—it was other agents from my office, and I think on more than two occasions except, barring the time he was arrested on this particular charge. He might have been. I was not there at that time. But I know other occasions while arresting the [112] defendant and assisted by other agents, those are the only two occasions that I remember I was there. It is based on memory. I believe I was there twice.

Q. One was the time you have described and one other time?

A. The second time he was arrested, yes.

Q. Were you there at the time he was arrested on this charge? A. No, I was not.

(Testimony of Thomas E. McGuire.)

Q. So you were there twice, and as far as you know the agents who arrested him at this time may have made a search?

A. Yes, that's true.

Q. Do you know whether or not you or any other agents in your office have been following the defendant?

A. I have attempted to follow him on numerous occasions, yes. He has been under investigation by my office and by the State Narcotics Office, and officers from the Police Department on various occasions.

Q. Have you ever gone to any place where he lived and communicated any information to the owner of those apartments?

A. No, I have not. The only place I ever knew he lived, at least of my own knowledge, or at least, knew that he lived there, was the address I have. I have only been working on him since 1942, since I arrived in San Francisco. The only occasion that I had is when I ascertained that he was living out at Thirty-eighth Avenue, that is where I went to, and my investigation was at that neighborhood, so I had no occasion to go anywhere else. [113]

Q. Do you know whether you or any other agent called his relatives, particularly his sister-in-law and brother-in-law, as to his activities?

A. Yes. I recall distinctly the original investigation when I came here to San Francisco. I had no knowledge of where the defendant was living. However, he had been under investigation by other

(Testimony of Thomas E. McGuire.)

officers. I had the benefit of that information. We had learned that he had——

Mr. Duane: Just a minute. We will object.

The Court: Yes.

The Witness: Well, I went to the sister-in-law and questioned—I ascertained from the sister-in-law where the defendant was living at the present time at that time. That was the extent of it.

Mr. Davis: Q. Did you or any other agent, to your knowledge, question his brother-in-law?

A. I was present and spoke to the brother-in-law at the time.

Q. Will you tell me what were your reasons for searching the defendant's home on the occasions other than you have testified to when it was searched when he was arrested on a charge of receiving Government property.

Mr. Duane: I object to that as incompetent, irrelevant, and immaterial.

Mr. Davis: I believe the law is clear that if the defendant raises the point that he has been, as in this case, annoyed, [114] and that his premises were searched by agents, that the Government is entitled in rebuttal to show whether or not the agents had any probable cause to be doing that.

The Court: Well, I think that that is a collateral matter. I don't regard the matter as being pertinent or material to the specific charge here. It wouldn't make any difference whether he was followed by agents or whether they were investigating him, or not. Those are immaterial matters.

(Testimony of Thomas E. McGuire.)

The only question before the jury is whether he is guilty or innocent of the specific charge.

Mr. Davis: My only purpose of introducing it, your Honor, I will grant you that it is immaterial, is in view of the defendant's counsel's statement to the jury as to what he was going to prove, that this man was in fact annoyed and badgered, and if he did commit the offense it was done because the agents had it in for him and they were trying to pin it on him. I believe it is pertinent to rebut the defense.

Mr. Duane: Pardon me. I think I should correct Mr. Davis, I did not say if he did commit this offense he did so because——

Mr. Davis: I did not say you said it. I said that that is what the defense theory is, that if he did commit it he did it because he was badgered.

The Court: I intend to instruct the jury that the only matter for them to consider is the guilt or innocence of the defendant on the charge contained in the indictment. These [115] other matters are immaterial.

Mr. Davis: If that is your Honor's instruction, then I will not ask any further questions along that line and I am through with this witness.

Cross-Examination

Mr. Duane: Q. Mr. McGuire, you say that you went over to these relatives in Oakland to ascertain where the defendant was living at the time.

A. Yes, sir.

(Testimony of Thomas E. McGuire.)

Q. Is that right?

A. That is partly the reason, yes.

Q. You say that was partly the reason. What was the other reason?

A. To verify the fact whether the defendant's relations, as I understood from my source of information, were objecting to his selling of narcotics, and I wished to interrogate them along that line.

Q. Did you interrogate them along that line?

A. I don't recall the full conversation, but the fact I had gained some information from the Beckwiths was sufficient at that time when I found that there was a friendly feeling between the defendant and the sister-in-law.

Q. Now, let me ask you if you did not say to her that the defendant was dealing in narcotics?

A. The best recollection that I have of that conversation now, Counsellor, was I asked [116] about Lemonhead Sylvestri, if she knew Lemonhead Sylvestri.

Q. Let's confine it to the **defendant**.

A. Well, that was in conjunction with the defendant. I asked when she had visited the defendant if she had met Lemonhead Sylvestri.

Q. But part of your mission was to ascertain where the defendant was living?

A. Well, that was incidental, yes. I wouldn't say incidental, it was important. The reason why I went there——

Q. You knew at that time——

(Testimony of Thomas E. McGuire.)

A. No, I did not, counsel.

Q. You did not know? A. No.

Q. Let me ask you if you did not say to that lady, Mrs. Beckwith, and also to her husband, that you knew that they had been to the defendant's home place up on the Russian River over a week-end?

A. No, I disagree with you on that, Counsel. I did not say that to the woman. She told me that she had been.

Q. The sister-in-law had told you that that was where Sorrentino was?

A. At that present time she didn't know that he was up at the Russian River.

Q. Then if she states that you told her that you knew that she had been up there, you knew who had been up there, you knew [117] that her husband had been there and that other people had been there, she is incorrect?

A. She is definitely incorrect, because it was after that conversation I had with her that I went to the Russian River and established where the man was living.

Q. When did you call on Mrs. Beckwith?

A. The exact date I couldn't say here, but it must have been sometime in the early part of August, because I arrived in San Francisco approximately the 1st of June and I didn't begin to work—I was assigned by my district supervisor at that time to work on this man from approximately the first of August, so it was within about

(Testimony of Thomas E. McGuire.)

three or four days after I established that Mrs. Beekwith was his relative and from the source of information I had at the time it was that there was a disagreement between them in his manner of living.

Q. Let's go to the matter of the stolen property. As a matter of fact, there was no stolen property, was there?

A. Yes, sir, there was.

Q. Well, as a matter of fact, you arrested the defendant and he was taken before the United States Commissioner down on this floor in this building.

A. I will have to correct that. The United States Commissioner——

Q. Is that so?

A. No. The United States Marshal arrested the defendant. [118]

Q. You came down with him?

A. I won't say I did. I was there with the United States Marshal when he was arrested, and I believe that the marshal took him in his automobile and came down.

Mr. Davis: I object to this as incompetent, irrelevant, and immaterial on the same theory that your Honor has sustained Mr. Duane's objection to my questioning. The only point in ascertaining why Mr. McGuire or the other agents went to that house was to determine whether or not they went there to search for narcotics, or whether they went there for some other purpose.

(Testimony of Thomas E. McGuire.)

Mr. Duane: It is our contention that the issuance of the warrant was a subterfuge to get into the house. I will offer to prove the defendant was brought down here and Mr. McGuire was present in the commissioner's room when there was what is termed a preliminary hearing, and the defendant was turned loose right there. There was no basis for the arrest and the goods were not stolen, and I think the jury is entitled to know that.

The Court: I think the jury has enough to do to try the particular charge without trying half a dozen other matters that have no relationship to the present charge. I would hold that it is incompetent, irrelevant, and immaterial.

Mr. Duane: Well, if the Court please, there is this feature, it would appear that this defendant had also been involved in some other crime, and I think that should be cleared [119] up in the minds of the jurors that he was not.

Mr. Davis: You brought it out.

Mr. Duane: That is all I have in mind.

Mr. Davis: You brought it up.

Mr. Duane: Yes.

Mr. Davis: I certainly did not bring it up.

Mr. Duane: Sure.

Mr. Davis: I will stipulate he was not convicted of receiving Government property.

Mr. Duane: Nor was he held to the court.

Mr. Davis: I don't know about that. All I know he was not convicted of it.

Mr. Duane: Mr. McGuire, while you were in

(Testimony of Thomas E. McGuire.)

that house you say the defendant was very belligerent.

A. Yes, he was.

Q. How was he dressed?

A. He had a bathrobe on, red bathrobe, if I recall correctly.

Q. And had his hands in his pockets?

A. Yes.

Q. Both pockets in the bathrobe?

A. Well, at the moment I entered he had his hands in the pockets but then he was waving his hands wildly and wanted to know each one of us, what the purpose was in coming there, and kept yelling that we had no right to arrest him.

Q. And he had his hand in his pocket? [120]

A. At the moment I was telling about—

Q. As I recall your testimony, his fists were doubled?

A. Well, in the small bathrobe pocket that he had I could see the fist, a white paper with his fist around it, or alongside of it.

Q. Which hand was that?

A. I believe, I would say it was the right hand.

Q. The right hand?

A. As I remember correctly. Now, you are asking me something that happened in 1942, counsellor.

Q. You remember pretty well. He had his hand in his pocket with his fist doubled around a piece of paper in his hand.

A. I won't say the paper was in his pocket. I observed the piece of little paper, or a Kleenex of the same type in which I was interested; he had

(Testimony of Thomas E. McGuire.)

this tissue paper or Kleenex in his pocket, which I observed. Whether it was in his hand or below his hand, or sticking out the edge of the pocket, I won't say.

Q. What about the left hand?

A. I can't answer exactly on that what happened.

Q. Was that in his pocket also?

A. I won't say whether it was, or not. It could be.

Q. Well, I thought—Pardon me. Just strike that. As I recall your testimony you told him to take his hands out of his pockets. [121]

A. Well, whether he did—if you think he did, if he says he had both hands in his pockets I will say he probably did.

Q. He probably did. You told him to take his hands out of his pockets. Did he take them out?

A. Well, it happened rather quickly; I don't know. I won't say whether he took his hands out before I forced him into the settee or he opened his hand first, or what; it happened, it didn't take a split second. I forced him to remain quiet.

Q. How did you force him?

A. Well, there is only one way I could push him back with my hand.

Q. That is what you did? A. Yes.

Q. You did not strike him?

A. I won't say I struck him, Counsellor.

Q. You would not say that?

A. I did have sufficient force behind my push

(Testimony of Thomas E. McGuire.)

to make him remain quiet and sit down. If he says I struck him then perhaps I did.

Q. You struck him on the face?

A. I won't say that. I thought, if my memory serves me right, that I struck him in the chest, or pushed him in the chest. If I struck him in the face—I don't recall it.

Q. The left eye?

A. I won't say that. There was no mark.

Q. There was no mark?

A. I don't recall any marks on him at the time. I never heard mention of it later on.

Q. Let me ask you if after he was brought down to the Post Office Building, here, and into the United States Commissioner's Office, you being present, you saw the discoloration on his eye?

A. No.

Q. You did not?

A. I don't believe I came down here, Counsellor. I can't recall coming down here. I don't mean to correct you. I am sorry if I did.

Q. No, no.

A. You say I did come down here to the United States Commissioner's Office. I believe my investigation had terminated out at his house. I don't recall coming down.

Q. If I told you I was there with you in the Commissioner's room——

A. That was the date he was arrested, Counsellor?

Q. The day he came up before the commissioner.

(Testimony of Thomas E. McGuire.)

A. Oh, oh. Well, he came up once or twice after that, Counsellor, and I am positive I was not—I never did come down to the Commissioner's hearing, but you told me later on he was acquitted. However, I won't dispute the fact.

The Court: Well, we are taking too much time.

Mr. Duane: All right. I will let it go. [123]

Mr. Davis: That is all. That concludes the Government's rebuttal.

(The cause was thereupon argued by respective counsel, the jury instructed by the court, no exceptions were taken by either counsel to the instructions of the court, the jury retired to deliberate, and subsequently returned into court with a verdict of guilty on count 1 and count 2 of the indictment. The jury was then discharged.)

The Court: Does the defendant wish to make any statement before judgment is pronounced?

Mr. Duane: At this time, if the Court please, I desire to interpose a motion for a new trial in the above-entitled action and I move the court for an order vacating the verdict of the jury convicting the defendant, and grant him a new trial on the indictment for the following reasons:

1. That the verdict is contrary to the evidence adduced at the trial herein and the verdict is not supported by the evidence in this case. That the evidence adduced at the trial is insufficient to justify

the verdict; that the verdict is contrary to law, and that the trial court erred in admitting evidence in the course of the trial which was incompetent, irrelevant, and immaterial, and which errors were duly objected to by the defendant. That motion is made upon the minutes of the court and upon all the records and papers in the case.

The Court: Do you wish to submit that motion? [124]

Mr. Duane: I would like to submit it.

The Court: Well, I believe I passed on the matters raised on your motion during the trial. I will deny the motion.

Mr. Duane: If the Court please, we at this time move in arrest of judgment and we base our motion on the following grounds: That the indictment and each of the counts does not state facts sufficient to constitute a public offense under the laws of the United States; that the evidence is insufficient to support the verdict; that the verdict of the jury is contrary to law, and based on those grounds we move an arrest of judgment.

The Court: That motion is submitted, too, Mr. Duane?

Mr. Duane: Yes, your Honor.

The Court: The court will deny that motion.

(Respective counsel thereupon addressed the court regarding the activities of the defendant and the court declared the sentence as follows:)

The Court: The court wishes to say that in my opinion the defendant has had very able representation in the case, but I cannot pass judgment on the basis of the competency or loyalty of counsel. I must pass judgment on the defendant as I see the case. I have very strong views concerning the enforcement of this statute. I consider the defendant in this case a dangerous character. He is dangerous to the community and he is dangerous to the lives and happiness of [125] thousands of people. He has been convicted by a jury on a charge on which the offense is made severe by the statute.

It will be the judgment of the court that the defendant serve a term of five years in Federal prison on count 1 of the indictment, and that he serve a term of ten years under count 2 of the indictment, and pay a fine of \$1000. The sentences on the two counts will run concurrently, inasmuch as the offense arose out of the same transaction and involves the same can of opium.

Mr. Duane: We will at this time, if the Court please, give notice orally of appeal and I wonder if your Honor will entertain a motion for bail, to fix bail at this time.

The Court: Well, I think you better present that—I would be a little bit in doubt about that, Mr. Duane, as to whether it is a proper case to allow bail, and I think you better, if you want to present that you better give some thought to it and present it to the court formally, perhaps on Monday or Tuesday, or whatever time suits your convenience.

Mr. Duane: Very well, your Honor.

The Court: The defendant will be remanded to the custody of the Marshal. We will adjourn.

CERTIFICATE OF REPORTER

I, Kenneth G. Gagan, Official Reporter, certify that the foregoing 126 pages is a true and correct transcript of matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability. [126]

[Endorsed]: No. 11533. United States Circuit Court of Appeals for the Ninth Circuit. Stephen Sorrentino, also known as Vincent Sorrentino, Appellant, vs. United States of America, Appellee.

[Endorsed]: No. 11533. United States Circuit Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 20, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11533

STEPHEN SORRENTINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES ON APPEAL

Now comes Stephen Sorrentino, the appellant in the above entitled cause, and submits herein his statement of points upon which he intends to rely on appeal, as follows:

1. That the evidence was and is insufficient to support the verdict of guilty.

2. That the Court erred in sustaining objections to questions propounded on cross-examination relating to one James Berry.

3. That the Court erred in sustaining objections to questions propounded on cross-examination relating to the informer.

4. That the Court erred in overruling appellant's objections to questions propounded by the United States Attorney to a Government witness, the answers to which attempted to establish that appellant had committed other crimes.

Appellant desires that the record, as certified to the Clerk of this Court, be printed in its entirety.

Dated: March 10, 1947.

/s/ WALTER H. DUANE,
Attorney for Appellant.

Receipt of a copy of the foregoing Statement of Points upon which Appellant relies on Appeal is hereby admitted this 10th day of March, 1947.

/s/ FRANK J. HENNESSY,
United States Attorney.

By /s/ T. SOLOMON.

No. 11535

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED
APR 5 - 1947

No. 11535

United States
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For the Ninth Circuit.

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY
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Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellants:

MESSRS. JONES & BRONSON and
MR. ALBERT OLSEN,

610 Colman Building,
Seattle, Washington.

Attorneys for Appellee:

MESSRS. CLARKE, CLARKE &
ALBERTSON,

1118 New World Life Building,
Seattle, Washington. [1*]

In the Superior Court of the State of Washington
for King County

No. 372545

J. W. VAN METER, B. B. GRANNING and J. D.
M. TREECE,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation, MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants.

COMPLAINT

Come now the plaintiffs and for cause of action against the defendants complain and allege as follows:

I.

That the plaintiffs, B. B. Granning and J. D. M. Treece, are co-partners engaged in the business of lending money and refinancing in the City of Portland, Oregon, doing business under the name of Granning & Treece; that the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a corporation organized under the laws of Pennsylvania for the purpose of conducting an insurance business, and that it is doing business in the State of Washington; that the defendants, Morton Pinch and Abe Goldman, are co-partners con-

ducting a general insurance business in the City of Seattle under the firm name and style of Lipman & Esfeld.

II.

That on or about the 10th day of November, 1944, the plaintiff, J. W. Van Meter, was the owner of the following described property located in the State of Washington, to-wit:

One International Harvester Tractor, Model 18TDR, S# 5685-T7-BJ, M#TDRM 5427 equipped with one Carco Single Drum, Model O, S# 254 CJ 54 and one Isaacson Angle Blade Dozer, Model #DAW18, S#18105-8778; [2]

that at that time American Discount Company, a Washington corporation, had a mortgage on said property; that American Discount Company maintained its office and place of business in the same office and room as the defendants, Morton Pinch and Abe Goldman, conducted their business in the Smith Tower Building in the City of Seattle; that plaintiffs are informed and believe that at that time the owners and officers of American Discount Company had an interest in the business of the defendants, Morton Pinch and Abe Goldman, and that the defendants, Morton Pinch and Abe Goldman, were officers or had an interest in American Discount Company; that on or shortly prior to November 10, 1944, the firm of Lipman & Esfeld were the duly authorized agents of the defendant, Franklin Fire Insurance Company.

III.

That on or shortly prior to November 10, 1944, plaintiff, J. W. Van Meter, requested the defendants to issue to him a policy of insurance indemnifying him against loss or damage to the above described property which might be occasioned by fire, collision, upset, theft, loading and unloading, or other hazards; that pursuant to that request the defendants issued Policy No. TR8629, a copy of which is attached hereto and made a part hereof.

IV.

That the property insured by said policy was of a movable character, and at that time it was located in Lewis County, Washington; that the property insured was logging equipment, and the plaintiff, J. W. Van Meter, was engaged in the logging contract business; that the defendants knew said equipment was movable and that the plaintiff, J. W. Van Meter, would move from one locality to another for the purpose of taking advantage of logging contracts [3] when the opportunity afforded itself; that the defendants knew, or should have known, that said property might be moved into Oregon or the State of California; that the insurance requested by the plaintiff, J. W. Van Meter, which the defendants agreed to provide, was to cover the plaintiff, J. W. Van Meter, against the casualties requested without any restrictions as to the place in which the property might be located or moved to; that notwithstanding the agreement and under-

standing with respect to the coverage not being limited to any particular area, there was inserted in the policy a provision stating as follows: "This insurance covers only within the limits of the State of Washington"; that said provision was inserted without the knowledge or consent of the plaintiffs and contrary to the preliminary agreement between the plaintiff, J. W. Van Meter, and the defendants, relative to the extent of the coverage; that plaintiffs are informed and believe that the provision limiting coverage to the State of Washington was inserted by the person writing up said policy through inadvertence and mistake and contrary to the understanding and instructions of the defendants, Abe Goldman and/or Morton Pinch, who were acting as agents for the defendant; that the policy which was issued, copy of which is attached to this complaint, was never exhibited or delivered to the plaintiff, J. W. Van Meter, prior to the time of the fire hereinafter referred to; that until about April 20, 1945, said policy was kept in the office of the defendants, Morton Pinch and Abe Goldman, doing business as Lipman & Esfeld, either among the files of American Discount Company, or among the files of Lipman & Esfeld.

V.

That the plaintiff, J. W. Van Meter, paid to the defendants the premium of \$238.50, being the consideration for which this policy was issued. [4]

VI.

That on or about April 19, 1945, the plaintiff,

J. W. Van Meter, having prior thereto been engaged in logging in Lewis County, Washington, obtained a logging job in Wallowa County, Oregon, and moved the equipment hereinabove described to Wallowa County, Oregon; that shortly prior to moving said equipment, the plaintiff, J. W. Van Meter, discussed his contemplated move with the defendants, Morton Pinch and Abe Goldman, and the officials of American Discount Company, and that the defendant, Franklin Fire Insurance Company, by and through its agents, the defendants, Morton Pinch and Abe Goldman, knew of the contemplated move to Wallowa County, Oregon; that said equipment was moved to Wallowa County, Oregon, on or about April 19, 1945; that after said equipment was moved to Wallowa County, Oregon, the defendants and each of them knew that said equipment had been moved outside of the State of Washington into the State of Oregon.

VII.

That about the time of the move the plaintiff, J. W. Van Meter, made arrangements for the plaintiffs, B. B. Granning and J. D. M. Treece, to pay off the mortgages held by American Discount Company on this and other equipment, and extend to the plaintiff, J. W. Van Meter, a line of credit secured by mortgages on this and other equipment; that shortly after April 19, 1945, the mortgage and loans held by the American Discount Company on this and other equipment owned by J. W. Van Meter were paid off, and that on or about April

20, 1945, the policy attached hereto together with other papers were forwarded to the plaintiffs, B. B. Granning and J. D. M. Treece, at Portland, Oregon; that at that time the defendants, Morton Pinch and Abe Goldman, had said policy in their possession or under their control and directed or acquiesced in the forwarding and delivery of said policy to the plaintiffs, B. B. Granning and J. D. M. [5] Treece, in Portland, Oregon; that subsequent thereto and on or about May 18, 1945, the defendant, Franklin Fire Insurance Company, by and through its agents, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, issued an endorsement to be attached to said policy making a loss payable to Granning & Treece and their assigns, and that said endorsement was forwarded to the plaintiffs, B. B. Granning and J. D. M. Treece, at Portland, Oregon; that subsequent thereto the defendants, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, and acting as agents for the defendant, Franklin Fire Insurance Company, by letter and otherwise, made statements and representations to the effect that the policy of insurance, copy of which is attached hereto, was still in full force and effect.

VIII.

That in all matters and things alleged in this complaint, the defendants, Abe Goldman and Morton Pinch, were acting as the duly authorized agents of the defendant, Franklin Fire Insurance Company; that by reason of the aforesaid acts, the defendants waived the provisions of the policy pur-

porting to insure only while said equipment was in the State of Washington, and elected to treat said insurance as being in full force and effect notwithstanding the removal of said equipment from the State of Washington.

IX.

That on or about the 4th day of September, the plaintiff, J. W. Van Meter, having obtained a logging contract near Redding, California, moved said equipment to the State of California, near the town of Redding, California; that on or about October 3, 1945, a fire occurred in the proximity of this equipment, and said equipment was seriously damaged by fire; that at the time just prior to said fire, said piece of equipment was worth the sum of \$8,800.00; that the value after said fire was the sum of \$2,546.00; that the total loss or damage to said equipment was the sum of \$6,254.00; that [6] the plaintiff, J. W. Van Meter, promptly notified the adjuster for the defendant, Franklin Fire Insurance Company, and that on or about October 10, 1945, the defendant, Franklin Fire Insurance Company, denied liability under said policy on the ground that it was located outside the State of Washington at the time of the fire; that at no time prior to the date of said fire did the plaintiff, J. W. Van Meter, see or have possession of said policy of insurance, and that at no time prior to said fire were the plaintiffs, or any of them, aware of the presence in the policy of that provision purporting to limit it to the State of Washington.

IX.

That on or about January 21, 1946, the plaintiff submitted proof of loss showing damage to said equipment in the amount of \$6,254.00; that the defendants and each of them have wholly failed and refused to pay said claims for damages and any part thereof; that plaintiffs have complied with all the other terms and conditions of said policy which are in any wise a condition precedent to the right to recover under the terms of said policy.

Wherefore, plaintiffs pray for judgment and decree as follows:

1. That the policy attached hereto be reformed by striking therefrom that provision in the indorsement which states, "This insurance covers only within the limits of the State of Washington".

2. That the plaintiffs have and recover judgment against the defendants and each of them for the sum of \$6,254.00, together with interest at the rate of six per cent per annum from October 4, 1945, and that they also recover their costs and disbursements herein.

JONES & BRONSON,

Attorneys for the Plaintiffs.

State of Washington,
County of King—ss.

Albert Olsen, being first duly sworn, on oath deposes and says: that he is one of the attorneys for the plaintiffs in the foregoing action; that he makes this verification for and on behalf of said plaintiffs for the reason that they are not now

present; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

ALBERT OLSEN.

Subscribed and sworn to before me this 18th day of April, 1946.

/s/ NELLIE L. RITTER,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed 1945. Apr. 18 p.m. 2 11.

[Endorsed]: Filed in County Clerk's office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk; by R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court June 7, 1946. Millard P. Thomas, Clerk; by Percy Maddux, Deputy. [8]

Transportation Policy
Inland Marine Department

No. TR 8629

Stock Company
The Franklin Fire Insurance Co.
of Philadelphia, Pennsylvania

Amount \$11,300.00

Rate - Various

Premium \$238.50

By This Policy of Insurance

In consideration of the stipulations and conditions herein and of Two Hundred Thirty-Eight and

50/100 Dollars Premium Does Insure J. W. Van Meter of Lewis County, Randle, Washington.

On all equipment as described herein between the 10th day of November, 1944, and the 10th day of November, 1945, beginning and ending with Noon, Standard Time at the place where this policy is countersigned.

To an amount not exceeding Eleven Thousand Three Hundred and No/100 Dollars in any one casualty, either in case of partial or total loss, or salvage charges, or any other charges or expenses, or all combined.

On lawful goods and merchandise consisting principally of As Per Form Attached the property of the assured, or held by them in trust, or on commission, or on consignment, or on which they have made advances, or sold but not delivered, loss, if any, payable to assured and The American Discount Corporation, as their respective interests may appear.

Inland Marine Department

Contractors Equipment Floater Insurance

1. This policy only covers the Body and Running Gear of the following described property, including equipment thereof while attached thereto and/or located thereon, to not exceeding the amount or amounts shown below in respect of each of the machines described, against loss or damage thereto, directly caused by the risks and perils insured against, while located as described herein and not

elsewhere. Assured warrants all equipment insured hereunder to be in sound condition at the time of attachment of this insurance.

2. Schedule

Each machine or interest to be deemed separately insured.

Description, including any identifying marks	Manufacturer	Year Built	Amount of Insurance	Rate
One International Harvester Tractor, Model 18TDR, S#5685-T7-BJ, M#TDRM 5427				
Equipped with one Cargo Single Drum, Model G, S#254 GJ 54 and one Isaacson Angle Blade Dozer, Model #DAW18, S#18105-8778				
			\$8,800.00	2%
One Cargo Logging Arch, Model #707, Serial #407, Equipped with Athey Crawler Wheels, #2554 and #256				
			\$2,500.00	2½%

3. This insurance covers only within the limits of the State of Washington.

4. This Policy insures direct loss or damage caused by:

- (a) Fire and Lightning;
- (b) Cyclone, tornado or windstorm;
- (c) Flood (meaning rising navigable waters);
- (d) Collapse of bridges or Culverts (warranted total load not in excess of the indicated carrying capacity of any bridge or culvert);
- (e) Explosion, excepting explosions originating within steam boilers, or internal explosion;
- (f) Stranding, sinking, fire, collision, including general average or salvage charges, but

only while being transported on any regular ferry;

(g) Collision, derailment or overturn while in transit by railroad and/or motor vehicles. (The coming together of railroad cars and/or motor vehicles during coupling operations or the striking of curbing or any portion of the roadbed shall not be deemed a collision.)

(h) Collision and/or upset

(i) Theft

(j) Loading and/or unloading

With respect to perils outlined only in clause (h) and (i) it is understood and agreed that each claim for loss or damage shall be adjusted separately and form the amount of each loss when determined the sum of \$25.00 shall be deducted.

5. This Policy does not insure against:

(a) Loss or damage occasioned by the weight of load exceeding registered lifting capacity of any machine; or loss due to wear, tear or breakage incidental to actual operation;

(Clause (b) is deleted)

(c) Loss or damage caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions;

(d) Loss or damage to automobiles, trailers, semi-trailers, or similar conveyances, plans, blue prints, designs or specifications;

(e) Mechanical breakdown; nor against damage to electrical apparatus caused by electricity whether artificial or natural, unless fire ensues and then only for loss or damage by such ensuing fire;

(f) Loss or damage to property insured hereunder while located underground, while water borne, (except while on regular ferry lines) or after it has become a permanent part of any structure.

Special Conditions

(a) This Company shall not be liable for a greater proportion of any loss, damage or expense to the property insured hereunder than the amount insured hereunder bears to the actual cash value of the property destroyed or damaged, at the time such casualty shall occur, nor for more than the proportion which the amount insured under this policy bears to the total amount of insurance effected thereon; and in no event shall this Company be liable for an amount in excess of the amount insured hereunder in respect of each article or interest as set forth above, either in case of partial or total loss or salvage, or any other cost and expense, or all combined.

(b) Warranted that the assured hereunder does not hold any agreement and will not enter into any agreement with any Corporation, concern or individual to relieve said Corporation, concern or individual from any liability which the law or custom may impose upon them.

(c) Privilege is granted to use and operate the property insured [10] hereunder as customary to the business engaged in.

Attached to and forming part of Policy No. TR 8629 of the Franklin Fire Insurance Company.

Agency: LIPMAN & ESFELD

By MORTON PINCH.

Dated; November 10, 1944.

Pacific Northwest Marine Department

Endorsement

Contractors Equipment Classification

War Risk Exclusion Endorsement

Notwithstanding anything contained herein to the contrary, it is understood and agreed this policy does not insure against loss or damage arising from War, Invasion, Hostilities, Rebellion, Insurrection, Seizure, or Destruction under quarantine or customs regulations, Confiscation by order of any Government or Public Authority or risks of Contraband or Illegal Transportation and/or Trade.

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. TR 8629 of The Franklin Fire Insurance Company, issued to J. W. Van Meter, Dated at Seattle, Washington, November 10, 1944.

LIPMAN & ESFELD,

By MORTON PINCH.

This Policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy, but this policy shall not be valid unless endorsement is attached hereto, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.

Provisions required by law to be stated in this policy—this policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents this 10th day of November, 1944, but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at Seattle Washington.

W. BEYER,
Secretary.

H. V. SMITH,
President.

Countersigned this 10th day of November, 1944.

LIPMAN & ESFELD,
By MORTON PINCH,

ak 11/15/44

Agent. [11]

Conditions

1. Territorial Limits. This policy covers only within the limits of the United States and Canada.

2. Valuation. All goods and merchandise are, by agreement, valued at amount of invoice or if not under invoice, then at cash market value on date and at place of shipment, but this Company shall not be liable for a greater proportion of any loss or damage than the amount of insurance hereunder bears to 100% of the valuation of all of the goods and merchandise at risk at the time and place of any one disaster.

3. Other Insurance. It is expressly agreed that this insurance shall not cover to the extent of any other insurance whether prior, simultaneous or subsequent hereto in date, and by whomsoever effected, directly or indirectly covering the same property, and this Company shall be liable for loss or damage only for the excess value beyond the amount of such other insurance.

4. Misrepresentation and Fraud. This entire policy shall be void if the assured or his agent, has concealed or misrepresented or shall conceal or misrepresent in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the assured or his agent shall make any attempt to defraud this Company either before or after a loss. (Policies issued in the State of Massachusetts are subject to the provisions of the Mass. Act of 1907, Chapt. 576, Section 21.)

5. Machinery. In case of loss or injury to any part of a machine consisting when complete for sale or use of several parts, this Company shall only be liable for the value of the part lost or damaged.

6. Labels. In case of loss affecting labels, capsules or wrappers, the loss shall be adjusted on the basis of an amount sufficient to pay the cost of new labels, capsules or wrappers, and reconditioning the goods.

7. Benefit of Insurance. Warranted by the assured that this insurance shall not enure directly or indirectly to the benefit of any carrier, bailee or other party, by stipulation in bill of lading or otherwise, and any breach of this warranty, shall render this policy of insurance null and void.

8. Notice of Loss. Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the Home Office of this Company at 59 Maiden Lane, New York, N.Y., or to the agent of the Company issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said agent within four months of the date of the loss. A failure by the assured to file either such claim or such proof shall invalidate the claim. All adjusted claims shall be due and payable thirty days after the presentation and acceptance of proofs of loss at the office of this Company.

9. Sue and Labor. In case of loss or damage it shall be lawful and necessary for the assured, their factors, servants or assigns, to sue, labor and

travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or acceptance of an abandonment. In event of expenditure for salvage, salvage charges, or sue and labor expenses, the liability under this policy shall be limited to such proportion of such amounts as the amount of this insurance bears to the total value of the merchandise involved.

10. Subrogation. In all cases of loss the assured shall, at the request of this Company or its agents, assign and subrogate all their rights and claims against others to this Company at time of payment to an amount not exceeding the sum paid by this Company; and permit suit to be brought in the assured's name, but at this Company's expense, and the assured further agrees to render all reasonable assistance in the prosecution of said suit or suits. This Company is not liable for any loss, which, without [12] its consent, has been settled or compromised with others, who may be liable therefor.

11. Impairment of Liability. Any act or agreement by the assured, either before or after loss, whereby any right of the assured to recover the full value of, or amount of damage to, any property lost or injured and insured hereunder, against any carrier, bailee or other party liable therefor, is released, impaired or lost, shall render this policy

null and void, but the insurer's right to retain or recover the premium shall not be affected. The assured may, however, without prejudice to this insurance, accept the ordinary bills of lading issued by carriers whereby the liability of any railroad or Express Company is limited to \$50.00 on any shipment but not less than 50 cents per lb. actual weight on any shipment in excess of 100 lbs. and whereby the liability of public truckmen or motor carriers is limited to not less than \$50.00 on each bale, case or shipping package.

12. **Ascertainment of Loss.** This Company shall not be liable beyond the value of the merchandise insured hereunder, as provided herein, and the amount of loss or damage shall be ascertained or estimated according to such value with proper deduction for depreciation, however, caused, and shall in no event exceed what it would then cost the assured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the assured and this Company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this Company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this Company in accordance with the terms of this policy. It shall be optional, however, with this Company, to take all or any part of the articles at such ascertained or appraised

value and also to repair or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty days after receipt of the proof herein required of its intention so to do; but there can be no abandonment to this Company of the property described.

13. Appraisal. In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent, and disinterested appraisers, the assured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and failing to agree shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and umpire.

14. Reinstatement. Every claim paid hereunder reduces the amount of insurance by the sum so paid, but it is a condition of this policy that in the event of loss, the assured agrees to pay the insurer additional premium or premiums at pro rata rates, on the amount of such loss and to reinstate the full amount of this policy, such reinstatement to take effect immediately upon the occurrence which occasioned the loss, and the charges therefor to be made from such date.

15. Cancellation. This policy shall be cancelled

at any time at the request of the assured; or by the Company by giving fifteen (15) days' notice of cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having actually been paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice it shall retain only the pro rata premium. Notice of cancellation mailed to the last known address of the assured shall be a sufficient notice; the check of this Company, or its agents, when similarly mailed, shall be a sufficient tender of any unearned premium. [13]

16. Suit Against Company. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the requirements of this policy, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then, and in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.

17. Agent of Assured. If any party or parties other than the assured have procured this policy, or any renewal thereof, or any endorsement thereon, they shall be deemed to be the agents of the assured

and not of this Company in any and all transactions and representations relating to this insurance.

18. Assignment of Policy. This policy shall be void if assigned or transferred without the written consent of this Company. [14]

[Title of Superior Court and Cause.]

DEMURRER

Come now the defendants, Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, and demur to the plaintiffs' complaint for the reason and upon the ground that the complaint does not state facts sufficient to constitute a cause of action, as against said defendants.

CLARKE, CLARKE &
ALBERTSON,

Attorneys for Defendants,
Morton Pinch and Abe
Goldman, co-partners,
d/b/a Lipman & Esfeld.

Copy rec'd May 8, 1946. Jones & Bronson, Attorneys for Plaintiff. K.F.

[Endorsed]: Filed 1946, May 9 a:m: 9 30.

[Endorsed]: Filed in County Clerk's office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk; by R. C. Parkhurst, Deputy.

[Endorsed]: Filed U.S.D.C. June 7, 1946. [15]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Calvin S. Hall, Presiding Judge of the Superior Court of the State of Washington for King County, or to any other Judge who may be acting as Presiding Judge of said Superior Court of the State of Washington for King County at the time of the presentation of this petition:

Comes now the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, one of the defendants in the above-entitled cause, and respectfully petitions the above-entitled Court for the removal of this cause to the United States District Court for the Western District of Washington, Northern Division, and for cause for removal states:

I.

That this action was commenced by filing summons and complaint with the Clerk of the above-entitled Court upon the 18th day of April, 1946, and by service of summons and complaint upon the Insurance Commissioner of the State of Washington, as statutory attorney in fact for this petitioner for the purpose of receiving service of process upon the 19th day of April, 1946, and is now pending in the above-entitled Court.

II.

That the above-named plaintiff, J. W. Van Meter was, at and prior to the date of the commencement of this action and at all [16] times thereafter and is now a citizen and resident of the state of Washington, residing in Randle, Lewis County, Washington.

That the plaintiffs, B. B. Granning and J. D. M. Treece, were, at and prior to the date of the commencement of this action and at all times thereafter, and are now, citizens and residents of the state of Oregon, residing in Portland, Multnomah County, Oregon.

That the defendants, Morton Pinch and Abe Goldman, co-partners d/b/a Lipman & Esfeld, were, at and prior to the date of the commencement of this action and at all times thereafter, and are now, citizens and residents of the state of Washington, residing at Seattle, King County, Washington.

III.

That the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, is now and was, at and prior to the time of the serving and filing of this complaint, and at all times herein mentioned, a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, and a non-resident of the State of Washington.

IV.

That this action is one of a civil nature, of which the District Courts of the United States are given original jurisdiction; that the complaint alleges, in substance, that petitioner insurance company, in November, 1944, issued to the plaintiff, J. W. Van Meter, a policy insuring him against the hazard of loss by fire to certain logging equipment of a movable nature then located in Lewis County, Washington, through its agents, the defendants, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, and that said policy contained a loss payable clause to the American Discount Company, in which concern Pinch and Goldman were interested; that at the time of the issuance of said policy, defendants knew said equipment to be movable and that the insured might move to Oregon or California to take [17] advantage of logging contracts; that, although the insurance requested was without restriction as to locality of the insured property, the defendants nevertheless inserted the provision that "this insurance covers only within the limits of the state of Washington," which said provision was inserted without the knowledge or consent of the plaintiffs, contrary to the preliminary agreement and through inadvertence and mistake; that said policy was never exhibited or delivered to the plaintiff, Van Meter, and was, until April 20, 1945, kept either in the office of the defendants, Morton Pinch and Abe Goldman, or in the office of the American Discount Company; that in April of 1945, the plain-

tiff, J. W. Van Meter, moved the insured equipment to Oregon, having first discussed such contemplated move with the defendants, Morton Pinch and Abe Goldman, and that arrangements were then made whereby the plaintiffs, B. B. Granning and J. D. M. Treece, would pay off the American Discount mortgages and refinance the equipment; that this arrangement was carried out and on or about April 20, 1945, the insurance policy was forwarded to B. B. Granning and J. D. M. Treece and that on May 18, 1945, the defendants, Morton Pinch and Abe Goldman, as agents of the defendant insurance company, issued an endorsement changing the loss payee from American Discount Company to B. B. Granning and J. D. M. Treece, said agents at that time making statements and representations to the effect that the policy of insurance was still in full force and effect; that on or about the 14th day of September, 1945, the logging equipment was moved to California, near the town of Redding; that on October 3, 1945, it was damaged in a forest fire to the extent of \$6,254.00; that the defendant fire insurance company was given notice thereof but denied liability on the ground that its coverage was restricted to losses occurring while the property was located within the state of Washington; wherefor plaintiffs pray that the policy be reformed to eliminate the restriction of coverage to losses occurring within the state of Washington and that they recover judgment [18] against the defendants for the amount of damage to the equipment, plus interest and costs.

V.

That the plaintiffs in this cause have improperly and fraudulently joined as defendants in this action the said Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, who were, at the time of the commencement of this suit and at all times herein mentioned, and are now, citizens of the State of Washington, for the sole and only purpose of attempting to defeat or prevent a removal of this cause by your petitioner to the United States District Court for the Western District of Washington, Northern Division; that, as herein set forth and as will more fully appear upon an inspection of the pleadings of said plaintiffs in this cause, the said Morton Pinch and Abe Goldman are not now and never were necessary or proper parties defendant in this cause and in their pleadings herein said plaintiffs wholly fail to show any cause of action or right of recovery as against said Morton Pinch and Abe Goldman, or either of them; that said action is based upon an obligation stated to have arisen out of a contract of insurance issued by this petitioner; that neither of the said Morton Pinch or Abe Goldman are parties to said contract; that it is alleged that anything they did with reference thereto they did as agents of this petitioner and that they could not, therefore, be held individually liable thereon.

VI.

That there is in this action a separable controversy between citizens and residents of the States

of Washington and Oregon, to-wit, plaintiff J. W. Van Meter, a citizen and resident of the State of Washington, plaintiffs B. B. Granning and J. D. M. Treece, citizens and residents of the State of Oregon, and a citizen and resident of the State of Pennsylvania, to-wit, the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, defendant; that said separable controversy is between the plaintiffs [19] and your petitioner and consists of an alleged breach of an obligation under an insurance policy stated to have been issued by petitioner to the plaintiffs as insured and loss payees; that the liability claimed against your petitioner is a sole and separate liability allegedly arising out of its contract of insurance and its alleged obligations thereunder; that neither the defendant Morton Pinch nor the defendant Abe Goldman has any interest whatsoever in said controversy; that said separable controversy can be fully determined between plaintiffs and your petitioner, both as to issues of law and fact, without affecting the interest of the defendants Morton Pinch and Abe Goldman, or either of them, and that said defendants are not indispensable, necessary or proper parties to the separable controversy between plaintiffs and petitioner.

VII.

That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, to-wit, the sum of \$6,254.00; that the matter in con-

troversy in the separable controversy herein before referred to between plaintiffs and this petitioner exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, to-wit, the sum of \$6,254.00.

VIII.

That the time has not expired within which this petitioner, under the laws of the State of Washington, is required to plead or answer to the complaint of the plaintiffs and that petitioner herewith presents a good and sufficient bond in the sum of \$500.00, as provided by statute in such cases, duly conditioned as required by law, and that petitioner will enter into the United States District Court for the Western District of Washington, Northern Division, within thirty (30) days from the date of the filing of this petition a certified copy of the record in this suit and conditioned to pay all costs that may be awarded by the United States District Court for the Western District of Washington, Northern Division, if said [20] District Court should hold that said suit is wrongfully or improperly removed thereto.

Wherefore your petitioner prays that this Court proceed no further herein except to order the removal as required by law and to accept the bond presented herewith and direct that the transcript

of the record herein be made and certified as provided by law.

CLARKE, CLARKE &
ALBERTSON,
GEORGE W. CLARK,
Attorneys for Defendants.

State of Washington,
County of King—ss.

George W. Clarke, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, above-named, who is making the foregoing petition and asking for the removal of this cause from the Superior Court of the State of Washington for King County to the United States District Court for the Western District of Washington, Northern Division; that he is authorized to verify this petition on its behalf; that he makes this affidavit for the reason that the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, is a foreign corporation and no officer thereof is now in the State of Washington; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

GEORGE W. CLARKE.

Subscribed and sworn to before me this 3rd day of May, 1946.

ROSE MARIE McCLUNG,
Notary Public in and for the State of Washington,
residing at Seattle. [21]

Copy received 5/9/46. Jones & Bronson, Atty. for Pl.

Filed 1946, May 15, a.m. 10 35.

Filed in County Clerk's Office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk. By R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court June 7, 1946. Millard P. Thomas, Clerk. By Percy Maddux, Deputy. [22]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

This cause coming on duly and regularly for hearing upon the petition and bond of the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, for an order transferring this cause to the United States District Court for the Western District of Washington, Northern Division, and it appearing to the Court that the said defendant has filed a petition for such removal in due form of law and within the required time, and that said defendant has filed its bond duly conditioned, with good and sufficient sureties as provided by law, and that said defendant has given plaintiffs and other parties due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, Therefore, said petition and bond are hereby accepted and approved, and it is hereby ordered and adjudged that this cause be and the same is hereby removed to the United States District Court for the Western District of Washington, Northern Division, and the Clerk of this Court is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in Open Court this 15th day of May, 1946.

CALVIN S. HALL,
Judge.

Presented by:

GEORGE W. CLARKE,
Attorney for Defendant.

Filed 1946, May 15 a.m. 10 46.

Filed in County Clerk's Office, King County, Washington, May 24, 1946. Norman R. Riddell, Clerk. By R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District Court June 7, 1946. Millard P. Thomas, Clerk. By Percy Maddux, Deputy. [23]

[Title of Superior Court and Cause.]

BOND OF REMOVAL

Know All Men By These Presents: That the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, as principal, and the American Bonding Company of Baltimore, a corporation organized and existing under and by vir-

tue of the laws of the State of Maryland, duly authorized to carry on a surety bond business in the State of Washington and duly authorized to execute this bond, as surety, are held and firmly bound unto J. W. Van Meter, B. B. Granning and J. D. M. Treece, plaintiffs in the above-entitled action, their successors and assigns, in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are such that whereas said Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, has applied by petition to the Superior Court of the State of Washington for King County for the removal of a certain cause therein pending wherein J. W. Van Meter, B. B. Granning and J. D. M. Treece are plaintiffs, and said Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, are defendants, to the District Court of the United States for the Western District of [24] Washington, Northern Division, for further proceedings, on grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed.

Now, Therefore, if your petitioner, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, shall enter in said District

Court of the United States for the Western District of Washington, Northern Division, aforesaid, within thirty (30) days from the date of filing said petition, a certified copy of the record of such suit and shall pay, or cause to be paid, all costs that may be awarded therein by said District Court of the United States if said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void; otherwise, to remain in full force and effect.

Dated this 8th day of May, 1946.

FRANKLIN FIRE INSUR-
ANCE COMPANY OF
PHILADELPHIA, PENN-
SYLVANIA,

By GEORGE W. CLARKE,
Its Attorney.

[Seal] AMERICAN BONDING COM-
PANY OF BALTIMORE,
By ARTHUR EAGLE,
Its Attorney-in-Fact.

Copy received 5/19/46. Jones & Bronson, Attys.
for Pl.

Filed 1946, May 15 a.m. 10 35.

Filed in County Clerk's Office, King County,
Washington, May 24, 1946. Norman R. Riddell,
Clerk. By R. C. Parkhurst, Deputy.

[Endorsed]: Filed in the United States District
Court June 7, 1946. Millard P. Thomas, Clerk. By
Percy Maddux, Deputy. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1563

J. W. VAN METER, B. B. GRANNING and J. D.
M. TREECE,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a Corporation, MORTON PINCH and ABE
GOLDMAN, Co-Partners, d/b/a LIPMAN &
ESFELD,

Defendants.

ANSWER OF DEFENDANT, FRANKLIN FIRE
INSURANCE COMPANY OF PHILADEL-
PHIA, PENNSYLVANIA

Comes now the Franklin Fire Insurance Com-
pany of Philadelphia, Pennsylvania, a corporation,
one of the defendant in the above-entitled action,
and, for answer to plaintiffs' complaint, states:

I.

Answering paragraph II, defendant admits that
the plaintiff, J. W. Van Meter, was the owner of
the equipment set out, upon the date stated; that
said equipment was mortgaged to the American
Discount Company; that the American Discount
Company and defendants, Morton Pinch and Abe

Goldman occupied adjoining office space in the same room in the Smith Tower Building in the city of Seattle; that on and shortly prior to November 10, 1944, the firm of Lipman & Esfeld was a duly licensed local agent of this defendant, having only the power existing under the statutes of the State of Washington by virtue of such license, and denies each and every other allegation in said paragraph contained.

II.

Answering paragraph III, defendant admits that, at the request of the American Discount Company, it issued its policy No. TR-8629, a copy of which is attached to plaintiffs' complaint, and denies each and every other allegation in said paragraph contained. [26]

III.

Answering paragraph IV, defendant admits that the description of the property insured was of such a nature as to indicate that it was movable; admits that the policy contained a provision stating "This insurance covers only within the limits of the State of Washington"; admits that this policy was held in the possession of the American Discount Company as loss payee until on or about April 20, 1945; and denies each and every other allegation in said paragraph contained.

IV.

Answering paragraph V, defendant admits that the premium on said policy was paid on behalf of the plaintiff, J. W. Van Meter, and denies each and every other allegation in said paragraph contained.

V.

Answering paragraph VI, defendant admits that the plaintiff, J. W. Van Meter, having prior thereto been engaged in logging in Lewis County, Washington, did, on or about April 19, 1945, move the equipment described in the policy of insurance sued upon to Wallowa County, Oregon, and denies each and every other allegation in said paragraph contained.

VI.

Answering paragraph VII, defendant admits that at some time prior to April 20, 1945, the plaintiff, J. W. Van Meter, made arrangements with plaintiffs, B. B. Granning and J. D. M. Treece, whereby B. B. Granning and J. D. M. Treece paid off the mortgage held by American Discount Company, substituting their own therefor, and that on or about April 20, 1945, the American Discount Company forwarded the policy sued upon to B. B. Granning and J. D. M. Treece; that thereafter and at the request of B. B. Granning and J. D. M. Treece an endorsement was issued under date of May 18, 1945, by Lipman & Esfeld as agent and forwarded to B. B. Granning and J. D. M. [27] Treece recog-

nizing them as loss payees under the policy, and denies each and every other allegation in said paragraph contained.

VII.

Answering paragraph VIII, defendant states that in counter-signing the policy sued upon and the endorsement referred to, the defendants, Morton Pinch and Abe Goldman, were acting as licensed agents of this defendant, and denies each and every other allegation in said paragraph contained.

VIII.

Answering paragraph IX, this defendant admits that on or about the 4th day of September, 1945, the plaintiff, J. W. Van Meter, having obtained a logging contract near Redding, California, moved said equipment to the State of California near the town of Redding, California; that on or about October 3, 1945, a fire occurred which damaged said equipment, but denies that the value of said equipment or the extent of damage were in the amounts as alleged by the plaintiffs; admits that this defendant received notice of said fire and that it has denied any and all liability on account thereof on the ground that said loss occurred in the State of California whereas the coverage of the policy was restricted to the state of Washington; and denies each and every other allegation in said paragraph contained.

IX.

Answering the second paragraph numbered IX, defendant admits that on or about January 21, 1946, it received a document entitled "Proof of Loss" claiming damage to the insured equipment in the amount of \$6,254.00; admits that it has refused to pay said claim or any part thereof; and denies each and every other allegation in said paragraph contained.

For further answer, and by way of affirmative defense, defendant states: [28]

I.

That at the request of the American Discount Company plaintiff issued its policy No. TR-8629, copy of which is attached to plaintiffs' complaint, which said policy provided, among other things, as follows:

"This insurance covers only within the limits of the State of Washington;"

and that a copy of said policy was mailed to the plaintiff, J. W. Van Meter, at or about the time of the issuance thereof.

II.

That the loss referred to in plaintiffs' complaint occurred outside the State of Washington and within the State of California.

Wherefore defendant prays that plaintiffs' com-

plaint be dismissed and that defendant have and recover its costs and disbursements herein incurred.

CLARKE, CLARKE &
ALBERTSON,
GEORGE W. CLARKE,

Attorneys for Defendant,
Franklin Fire Insurance
Company of Philadelphia,
Pennsylvania.

Copy received June 7, 1946. Jones & Bronson,
Attorney for Pltff.

[Endorsed]: Filed June 7, 1946. [29]

[Title of District Court and Cause.]

DEMAND FOR TRIAL BY JURY

To Franklin Fire Insurance Company of Philadelphia, Pennsylvania, Morton Pinch and Abe Goldman, defendants, and their attorneys, Clarke, Clarke & Albertson:

Please take notice that Plaintiff demands trial by jury in this action.

JONES & BRONSON,
ALBERT OLSEN,
Attorneys for Plaintiffs.

Received June 14, 1946. Clarke, Clarke & Albertson. By R. M. McClung.

[Endorsed]: Filed June 15, 1946. [30]

[Title of District Court and Cause.]

MOTION TO STRIKE DEMAND FOR TRIAL
BY JURY AND SET CASE FOR TRIAL
BEFORE THE COURT

Comes now the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, and moves that plaintiffs' demand for trial by jury heretofore filed in the above-entitled action be stricken and that said case be set for trial before the Court for the reason and upon the ground that, as appears from plaintiffs' complaint, the action is of equitable cognizance, consisting of a request for reformation of a policy of insurance and is not a proper case for trial before a jury.

CLARKE, CLARKE &
ALBERTSON,
GEORGE W. CLARKE,

Attorneys for Defendant,
Franklin Fire Insurance
Company of Philadelphia,
Pennsylvania.

Received copy 6/17/46. Jones & Bronson, By
V. Miller, Atty. for Plaintiffs.

[Endorsed]: Filed June 17, 1946. [31]

[Title of District Court and Cause.]

ORDER STRIKING JURY DEMAND

This matter having come on duly and regularly for hearing before the undersigned Judge of the

above-entitled Court upon Monday, the 22nd day of July, 1946, upon motion of the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to strike plaintiffs' demand for a jury trial, and the Court having listened to arguments of counsel and being fully advised in the premises does hereby find that plaintiffs' complaint seeks relief in equity, to-wit, the reformation of an insurance policy; that plaintiffs are not entitled to a jury trial as a matter of right; that this is not a case wherein the Court wishes to call an advisory jury; and

It Is Therefore Ordered that plaintiffs' demand for a jury trial be and the same is hereby denied and stricken.

Done In Open Court this 24th day of July, 1946.

JOHN C. BOWEN,

Judge.

Presented by:

GEORGE W. CLARKE,

Attorney for Defendants.

[Endorsed]: Filed July 24, 1946. [32]

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL AS TO DEFENDANTS MORTON PINCH AND ABE GOLDMAN, CO-PARTNERS, D/B/A LIPMAN & ESFELD

This matter having come on duly and regularly for hearing before the undersigned Judge of the

above-entitled Court upon Monday, the 22nd day of July, 1946, upon the demurrer of the defendants, Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, filed in the State Court prior to the removal of said cause to the above-entitled Court, and the Court having considered said demurrer as a motion to dismiss, and having listened to arguments of counsel and being fully advised in the premises, and finding that plaintiffs' complaint does not state a cause of action as against said defendants, Morton Pinch and Abe Goldman, d/b/a Lipman & Esfeld, and that the same should be dismissed as to them; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs' complaint be and the same is hereby dismissed as to the defendants Morton Pinch and Abe Goldman, co-partners, d/b/a Lipman & Esfeld, and that said defendants be and they are hereby granted judgment against the plaintiffs for their costs, to be taxed.

Done In Open Court this 24th day of July, 1946.

JOHN C. BOWEN,

Judge.

Presented by:

GEORGE W. CLARKE,

Attorney for Defendants.

[Endorsed]: Filed July 24, 1946. [33]

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL

The above-entitled action having come on duly and regularly for trial before the undersigned Judge of the above-entitled Court upon the 16th day of September, 1946, and trial thereof having continued to the 17th day of September, 1946, and plaintiffs having completed the presentation of their evidence and having rested their case, and the defendant, Franklin Fire Insurance Company of Philadelphia, Pennsylvania, having thereupon moved for a dismissal upon the grounds that upon the facts and the law plaintiffs had shown no right to relief, and the Court having listened to argument of counsel and being fully advised in the premises;

Now, Therefore, the Court Does Hereby Find, Order, Adjudge and Decree that the plaintiffs have shown no right to relief against said defendant; that the said defendant's motion is well taken, and that the same be and it is hereby granted, and that plaintiffs' complaint be and the same is hereby dismissed, with prejudice.

Done In Open Court this 18th day of September, 1946.

HOWARD C. SPEAKMAN,
Judge.

Presented by:

GEORGE W. CLARKE,
Attorney for Defendants.

[Endorsed]: Filed Sept. 18, 1946. [34]

PLAINTIFFS' EXHIBIT 2

Cause 1563. Admitted Sept. 16, 1946.

Standard Forms Bureau Form 199-S (July, 1917)

Former Mortgage Satisfied

Endorsement Blank

Endorsement dated May 18, 1945. Agency at Seattle, Washington.

Attached to Policy No. TR-8629 of the Franklin Fire Insurance Co.

Issued to J. W. Van Meter.

Commencement of Policy—11-10-44.

Expiration of Policy—11-10-45.

Amount insured—\$11,300.

Loss, if any, subject to the terms and conditions of this policy, payable to Granning & Treece and/or their Assigns.

All other terms and conditions remain unchanged.

LIPMAN & ESFELD,

By MORTON PINCH,

Agent. [35]

PLAINTIFFS' EXHIBIT 3

Cause 1563. Admitted Sept. 16, 1946.

Morton Pinch

A. J. Goldman

Lipman & Esfeld

General Insurance

205 Smith Tower

Seattle, Wash.

Telephone MAin 2841

May 1, 1945

Mr. John Van Meter,
Box 892,
Randle, Washington.

Dear Johnnie:

RE: Trinity Universal Policy No. 906675.

We just received a letter from Granning & Treece of Portland, Oregon, requesting us to issue a "Loss Payable Endorsement" on the above policy.

Before this "Loss Payable Endorsement" can be issued it is necessary for your account to be paid up in full. You will note by the attached statement that there remains a balance of \$204.86. May we suggest that you immediately send us your check for this amount so we in turn can forward this Loss Payable Endorsement to this firm.

Yours very truly,

LIPMAN & ESFELD,

By /s/ A. J. GOLDMAN.

AJG:by

P.S. Are you still interested in securing that life insurance policy that you and I discussed some time ago? In the event you have misplaced or lost the proposal that was presented to you we are mailing you a duplicate. If you are interested please advise us and we in turn will authorize Dr. Leonard Asmundson of Morton, Washington, to make the usual medical examination. [36]

Statement

Lipman & Esfeld
General Insurance
205 Smith Tower
Seattle

5-8-45

J. W. Van Meter,
Box 892,
Randle, Wash.

Date	Item	Debit	Credit
11-10-44	Franklin 8629	\$238.50	
3-7-45	Trinity 906675		\$99.89
4-28-45	Trinity 740067	66.25	
		<hr/>	<hr/>
		\$304.75	99.89
		99.89	
		<hr/>	
		\$204.86	

For The Consideration Of
Mr. John Van Meter

Plan:

The Equitable's 20-Payment Life Contract.

Deposit:

\$177.10 annually.

Dividends:

The dividends are payable annually commencing the end of the second year. They may be withdrawn each year, or may be allowed to accumulate so as to increase the returns at maturity, or shorten the premium-paying period. Not guaranteed—based upon 1945 schedule.

For the Beneficiary:

In the event of your premature death, the Equitable would pay to the beneficiary designated by you, \$5,000.00, plus any dividends to the credit of the contract.

End of 20 Years:

At the end of 20 years, the policy will be completely paid-up for its insurance value of \$5,000.00. No further deposits are required, but the policy will continue to participate in annual dividends and increase in cash value.

At Ages 60 or 65:

Should you elect to convert the contract into cash or income at ages 60 or 65, the following options would be available:

	60	65
A. Guaranteed Cash Value	\$3,330.00	\$3,615.00
Dividend Accumulations	1,675.00	1,985.00
	<hr/>	<hr/>
Total Cash Available	\$5,005.00	\$5,600.00
B. Guaranteed Monthly Life Income,		
10-year certain	\$ 18.68	\$ 22.77
Dividend Accumulations	9.04	12.50
	<hr/>	<hr/>
Total Monthly Life Income	\$ 28.08	\$ 35.27

Paid-up Through Dividends:

This contract could be made fully paid-up in 14 years, through the use of the dividend accumulations. No. further deposits would be required, but the contract would continue to participate in annual dividends, and increase yearly in cash value.

Submitted by:

A. J. GOLDMAN.

31/m

E&OE [38]

PLAINTIFF EXHIBIT 4

Wallowa, Oreg.

May 14, 1945

Lipman and Esfeld

Gentlemen:

It is not clear to me what this Policy No. 906675 is for—I was under the impression that all insurance was included in the bill paid off by Granning and Treece of Portland when the contract was re-

financed. I would like you to send me a copy showing how you figured the interest refund on my loan.

In any case if I owe this bill for \$204.86 it will be during the month of June before I can possibly have funds to take care of it.

It was a heavy expense to get our equipment moved over here and set up to log. However, we are logging and earning but will be at least June before we have any money over our wages & taxes.

Trusting you can understand our situation.

Respectfully yours,

J. W. VAN METER.

Cause 1563. Admitted Sep. 16, 1946.

PLAINTIFF EXHIBIT 5

Morton Pinch

A. J. Goldman

Lipman & Esfeld
General Insurance

205 Smith Tower
Seattle
Telephone Main 2841

August 17, 1945

Mr. J. W. VanMeter
Wallowa, Oregon

Dear Mr. Van Meter:

This is in response to your letter of August 10th stating that you were under the impression that the insurance we were carrying on your equipment was

cancelled when you were refinanced by Granning & Treece of Portland.

We wrote you concerning this matter on May 18th in answer to your letter of May 14th wherein we explained how the balance of \$204.86 was arrived at. On the same date we wrote Granning & Treece in response to their request to send them Loss Payable Clauses under your insurance, from the American Discount Company to themselves. We believe if you check with them you will find that they did not write any insurance on the equipment that we had previously insured.

Under your logging equipment policy, as we previously advised you, the 1937 Dodge Truck and 1941 Paige Trailer were eliminated March 7th, which left only the 1943 White Truck and 1943 Paige Trailer covered. Consequently we only had one truck and trailer covered for you which expired August 9th, and any time any equipment was sold credit was allowed you. We are very certain that you have not had duplicate coverage in any form as Granning & Treece would not have ordered Loss Payable Clauses on your coverage from us if they had previously insured this equipment.

The \$66.25 still due us, as previously advised you, is on the Buick Coupe, which apparently was not mortgaged to Granning & Treece. This amount is still outstanding and if, after making this explanation to you, you find there is still some question we ask that you return the policy to us and pay the pro rata earned premium which will amount to

one-third of this amount. Therefore, will you do one of two things, either send us your check for the full amount or return the policy, Trinity No. 740067, with your check for \$22.08 by return mail.

Your immediate attention will be appreciated.

Very truly yours,

LIPMAN & ESFELD,
By MORTON PINCH.

MP/w

Cause 1563. Admitted Sep. 16, 1946. [40]

PLAINTIFF EXHIBIT 13

Western Union

1945 Oct 4 pm 6 55

3645 N. Mine St., Portland

TA13

T. EAA850 48 NL Collect—Seattle Wash 4

J. W. Van Meter, 89c

Redding, Calif Box 501

Re urwire October 4 claim on tractor referred to Insurance Company who will have adjuster contact you Wired you September 28 regarding premium on Buick unpaid which did not receive answer to

Necessary that you send us this amount immediately in order not to prejudice your present claim

LIPMAN & ESFELD.

4 28. .

Cause 1563. Admitted Sep. 16, 1946.

[41]

PLAINTIFF EXHIBIT 14

Morton Pinch

A. J. Goldman

Lipman & Esfeld
General Insurance205 Smith Tower
Seattle
Telephone Main 2841

October 30, 1945.

Granning & Treece
S. E. 8th & Hawthorne Blvd.
Portland 14, Oregon

Re: J. W. VanMeter — Franklin Policy TR-8629

Gentlemen:

This is to advise you of the expiration of the above captioned policy on November 10, 1945, which has loss payable in your favor. If we can be of any service to you in connection with same, please let us know.

Very truly yours,

LIPMAN & ESFELD,
By MORTON PINCH.

MP-W.

C.C. J. W. Van Meter

Cause 1563. Admitted Sep. 16, 1946. [42]

PLAINTIFF EXHIBIT 15

May 18, 1945

Mr. John W. Van Meter
Box 892
Randle, Washington

Dear Johnnie:

The enclosed letter is self-explanatory. It is necessary for us to go on record to the finance company of the balance outstanding which we have accordingly done.

In response to your letter regarding the arrival of the balance of \$204.86 it is as follows:

You had paid up the policy on the fleet of trucks which was issued in August. You had issued a contractors' equipment policy on your International Tractor and cargo logging arch in the amount of \$11,300.00 the premium on which amounting to \$238.50. On the fleet policy you had eliminated in March the Dodge Truck and Page trailer for which a credit was given of \$99.89.

This results in the balance indicated to the finance company. You renewed your insurance on your Buick Coupe in April, the premium being \$66.25. The total, therefore, amounts to \$204.86 due us. We do not know if the Buick was mortgaged as no loss payable is being requested for it and we are not calling to their attention the premium thereon. We think to simply matters it would be advisable

for you to approve payment by them of \$138.61, then you can take care of the insurance on the Buick.

We trust that this explanation is clear to you but should there be any question on same please let me know.

Yours very truly,

LIPMAN & ESFELD,
By MORTON PINCH.

MP:by

Cause 1563. Admitted Sep. 16, 1946. [43]

May 18, 1945

Granning & Treece
S. E. 8th & Hawthorne Blvd.,
Portland 14, Oregon

Re: John W. Van Meter
Trinity Policy #906675
Franklin Fire Policy
#TR 8629

Gentlemen:

In response to your letter of May 4th we are pleased to enclose herewith loss payable endorsements for the above captioned policies reading to yourselves and/or assigns. We wish to advise you there is a balance still due us on these policies of \$138.61. In view of the fact that this balance is

long past due we are wondering if you could add this amount to your loan subject to Mr. Van Meter's approval.

We are sending a copy of this letter to him so that if it is possible for you to do we he will know what the situation is and no doubt be willing to sign a note for this amount. Will you please advise in this connection.

Very truly,

LIPMAN & ESFELD,

By MORTON PINCH.

MP:by

CC: to Mr. J. W. Van Meter. [44]

PLAINTIFF EXHIBIT 16

Would you please issue a second loss payable

Re: The Franklin Fire Ins. Co.

Policy #TR 8629

Mr. J. W. Van Meter

the unpaid balance and the installments are the same as the other one.

Bal. \$204.86

Writ Granning & Treece—can't not issue loss payable until his account is paid.

Cause 1563. Admitted Sep. 16, 1946. [45]

Telephone East 7114

State License No. M-108

Granning & Treece

Automobile Finance

Loans

Refinancing

S. E. Eighth and Hawthorne Boulevard

Portland—14,—Oregon

Since 1919

May 4, 1945

Lipman & Esfeld

General Insurance

Smith Tower

Seattle, Washington

Gentlemen:

Re: Trinity Universal

Policy No. #906675

J. W. Van Meter

The above described policy is in our possession and we have an unpaid balance on the truck de-

scribed therein of \$32,592.45, payable in 15 monthly installments.

In order that we may be fully protected, please issue a "Loss Payable Endorsement" as of April 18, 1945, showing our interests as described above. If possible, we would prefer this rider to read: "Loss Payable to Granning & Reece and/or Assigns."

Your cooperation in forwarding to us this form as early as possible will be appreciated.

Yours truly,

GRANNING & TREECE,
By J. R. MULLINS.

JRM/by

[46]

PLAINTIFF EXHIBIT 17

May 18, 1945

Granning & Treece
S. E. 8th & Hawthorne Blvd.
Portland 14, Oregon

Re: John W. Van Meter
Trinity Policy #906675
Franklin Fire Policy
#TR 8629

Gentlemen:

In response to your letter of May 4th, we are pleased to enclose herewith loss payable endorse-

ments for the above captioned policies reading to yourselves and/or assigns. We wish to advise you there is a balance still due us on these policies of \$138.61. In view of the fact that this balance is long past due we are wondering if you could add this amount to your loan subject to Mr. Van Meter's approval.

We are sending a copy of this letter to him so that if it is possible for you to do we he will know what the situation is and no doubt be willing to sign a note for this amount. Will you please advise in this connection.

Very truly,

LIPMAN & ESFELD,

By MORTON PINCH.

MP:by

C.C. to Mr. J. W. Van Meter

Cause 1563. Admitted Sep. 16, 1946. [47]

PLAINTIFF EXHIBIT 18

Telephone East 7114 State License No. M-108
Granning & Treece
Automobile Finance Loans Refinancing
S. E. Eighth and Hawthorne Boulevard
Portland—14,—Oregon
May 19, 1945

Lipman & Esfeld
General Insurance
205 Smith Tower
Seattle, Washington

RE: John W. Van Meter
Trinity Policy #906675
Franklin Fire Policy
#TR 8629

Gentlemen:

We thank you for the loss payable endorsements for the above described policies, received with your letter of May 18.

As to the balance due on these policies and the proposal that we add the amount to our loan subject to Mr. Van Meter's approval. We regret that it would not be possible for us to take such a step without Mr. Van Meter's advance approval.

We feel certain that he will take care of the matter direct now that it has been brought to his attention.

Yours very truly,
By J. R. MULLINS.

M

Cause 1563. Admitted Sep. 16, 1946. [48]

DEFENDANTS' EXHIBIT A-2

Telephone East 7114

State License No. M-108

Granning & Treece

Automobile Finance

Loans

Refinancing

S. E. Eighth and Hawthorne Boulevard

Portland—14,—Oregon

April 20, 1945

American Discount Company

Seattle, Washington

Re: J. W. Van Meter Account on

Logging Trucks, Trailers

and Various Equipment

Gentlemen:

In accordance with our recent telephone conversation, we are enclosing herewith a certified check of the Page and Page Company of this city in the amount of \$14,538.61, covering the balance in full on the above account as quoted by phone.

The reason this is not our check is because the matter was handled through the above dealer and therefore it was necessary to issue their check as our check was remitted to them for a larger amount.

You will note, however, that the enclosed authorization specifies that all papers, titles, notes, mortgages, insurance policies and other papers are to be forwarded direct to this office. We will appre-

ciate your prompt attention to the forwarding of these papers.

Very truly yours,

GRANNING & TREECE,
By J. D. M. TREECE.

JDMT emw

Defendants' Exhibit No. 2 for identification.
Deposition of Sol Esfeld, September 12, 1946.

EARL R. FIELD,
Notary Public.

Cause 1563. Admitted Sep. 16, 1946. [49]

B. B. Granning J. D. M. Treece

Granning & Treece

Automobile Finance Loans Refinancing

Portland, Oregon

Main Office

East 8th and Hawthorne Ave.

Phone East 7114

Branch Office

185 East Broadway

Trinity 4491

American Discount Company

Seattle, Wash

Gentlemen:.

In accordance with the following authorization we are enclosing herewith our check to be applied on the account described below:

Your account No.

Amount of our check covering balance in
full \$14,538.61

Name: J. W. Van Meter,

Address: Wallowa, Oregon.

Logging trucks, trailer, Buick automobile
Car and other equipment Model.....

Motor No. Serial No.

Purchased from

Kindly forward all papers in connection with
this account direct to us.

Yours very truly,

GRANNING & TREECE,

American Discount Company,
Seattle, Washington

Gentlemen:

You are hereby authorized to accept payment of
my account in full from Granning & Treece and to
return the State Certificate of Title, notes or con-
tract, insurance policy and other papers direct to
them. If I am entitled to any refund for unearned
interest or insurance premium you may also return
that direct to Granning & Treece.

/s/ J. W. VAN METER.

Dated April 20, 1945. [50]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the plaintiffs and move the Court to set aside the judgment and dismissal entered herein on the 18th day of September, 1946, and to grant plaintiffs a new trial on the ground that:

1. There was error of law occurring at the trial.
2. The judgment is contrary to law.

Specifically, the plaintiffs contend that the Court erred in concluding:

1. That the decisions of the 9th Circuit Court of Appeals in the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 99 F. (2) 333, 108 F. (2) 713, were controlling and could not be distinguished.
2. That the plaintiffs were negligent in failing to have gone back and asked to examine the policy, and were chargeable with notice of its provisions.
3. That the plaintiffs were not entitled to a reformation of the insurance policy, as prayed for, or were not entitled to recover on the theory of waiver or estoppel or election.

Submitted herewith is a memorandum brief in

which the [51] foregoing propositions are discussed in more detail.

JONES & BRONSON,
Attorneys for Plaintiffs.

Received Sept. 25, 1946. Clarke, Clarke & Albertson; by R. M. McClurg.

[Endorsed]: Filed Sept. 25, 1946. [52]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION FOR
NEW TRIAL

This matter having come on duly and regularly for hearing before the undersigned Judge of the above-entitled Court upon the 30th day of September, 1946, upon plaintiffs' motion for a new trial, and the Court having listened to arguments of counsel and being fully advised in the premises does hereby find that plaintiffs' motion is not well taken and should be overruled; now, therefore,

It Is Ordered, Adjudged and Decreed that plaintiffs' motion for new trial be and the same is hereby overruled.

Done in Open Court this 30th day of September, 1946.

HOWARD C. SPEAKMAN,
Judge.

Presented by:

GEORGE W. CLARKE,
Attorney for Defendant.

[Endorsed]: Filed Sept. 30, 1946. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that J. W. Van Meter, B. B. Granning and J. D. M. Treece, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in this action on September 18, 1946.

Dated this 12th day of December, 1946.

JONES & BRONSON and
ALBERT OLSEN,
Attorneys for Appellants.

[Endorsed]: Filed Dec. 12, 1946. [54]

United States Circuit Court of Appeals
for the Ninth District

Dist. Ct. No. 1563

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Plaintiffs,
Appellants,

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation, MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants,
Appellees.

STATEMENT OF POINTS
TO BE RELIED UPON

The points upon which appellants intend to rely
on this appeal are as follows:

I.

The Court erred in denying plaintiffs' request
for jury trial and striking plaintiffs' demand for
jury trial.

II.

The Court erred in finding that the plaintiffs'
were not entitled to a reformation of the policy
as prayed for in the Complaint.

III.

The Court erred in finding that the plaintiffs' were not entitled to recover on the theory that the defendant, through its agents, had waived or was estopped to rely on that provision in the policy purporting to limit coverage to the State of Washington.

IV.

The Court erred in concluding that the decisions of the Ninth Circuit Court of Appeals in the case of *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2nd 333, 108 Fed. 2nd 713 were decisive of the issues in this case.

V.

The Court erred in dismissing the case at the close of [55] the plaintiffs' case on defendants' motion challenging the sufficiency of the evidence.

VI.

The Court erred in denying appellants motion for a new trial.

JONES & BRONSON,

Attorneys for Appellants.

Received Jan. 6, 1946. Clark, Clarke & Albertson; by R. M. McClurg.

[Endorsed]: Filed in the U.S.D.C. Jan. 8, 1947. Millard P. Thomas, Clerk; by Percy Maddux, Deputy. [56]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
2. Order of Removal dated May 15, 1946.
3. Demurrer of Defendants, Abe Goldman and Morton Pinch.
4. Answer of Defendant, Franklin Fire Insurance Company.
5. Demand for Trial by Jury.
6. Motion to Strike Demand for Jury Trial.
7. Judgment of Dismissal As To Defendants, Abe Goldman and Morton Pinch, dated July 24, 1946.
8. Order Striking Jury Demand, July 24, 1946.
9. Transcript of Proceedings at Trial, two copies of which are filed herewith, omitting therefrom lines 19 to 25 inclusive on page 25, Pages 26 to 49 inclusive and lines 1 to 7 inclusive of page 50, being part of the testimony of J. W. Van Meter and lines 14 to 25 inclusive of page 95, pages 96 to 99 inclusive and lines one to 6 inclusive of page 100, being part of the testimony of Howard Cooper.
10. The attached narrative of that part of J. W. Van [57] Meter's testimony appearing between

line 19, page 25, and line 7 of page 50 of the transcript of proceedings.

11. The following exhibits, plaintiffs' exhibit numbers 1, 2, 3, 4, 5, 13, 14, 15, 16, 17 and 18. (A copy of Exhibit No. 1 is attached to the Complaint so reference thereto can be made without recopying it). Also, defendants' Exhibit A-2.

12. Judgment of Dismissal, September 18, 1946.

13. Motion for New Trial.

14. Order Overruling Motion for New Trial.

15. Notice of Appeal.

16. Statement of Points on which Appellants Intend to Rely.

17. This Designation.

JONES & BRONSON,

[Endorsed]: Filed in U.S.D.C. Jan. 8, 1947.
Millard P. Thomas, Clerk; by Percy Maddux,
Deputy. [58]

In the District Court of the United States
for the Western District of Washington,
Northern Division

No. 1563

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation; MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants.

ORDER AS TO ORIGINAL EXHIBITS

This cause coming on to be heard on the motion of the plaintiffs (appellants) that the original of Exhibit No. 1 used at the trial of this action be sent to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of a copy thereof and it appearing to the Court that such original exhibit should be inspected by the appellant court.

It Is Ordered that the Clerk of the Above Entitled Court forward to the United States Circuit Court of Appeals for the Ninth Circuit plaintiffs' exhibit No. 1.

Done in Open Court this 13 day of January, 1947.

LLOYD L. BLACK,
Judge.

Presented by Albert Olsen, one of Attys. for pls.

Approved. Clarke, Clarke & Albertson, atty. for
def. Franklin Fire Ins. Co.

[Endorsed]: Filed Jan. 13, 1947. [61]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
FILING RECORD

This matter coming on for hearing on the application of the plaintiffs (appellants) for an order of extending the time for filing the record, and it appearing that an extension of time is proper, and the Court being advised in the premises; now, therefore,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the Circuit Court of Appeals for the Ninth Circuit is extended until February 10, 1947.

Done in Open Court this 13 day of January, 1947.

LLOYD L. BLACK,
Judge.

Presented by Albert Olson, Atty for pls.

Approved. Clarke, Clarke & Albertson, attys. for
def. Franklin Fire Ins. Co.

[Endorsed]: Filed Jan. 13, 1947. [62]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby stipulated by and between the parties hereto through their respective attorneys of record, undersigned, that the Clerk of the above entitled Court may prepare and forward to the United States Circuit Court of Appeals for the Ninth District a supplemental transcript of the record on appeal containing the following:

- (1) Petition for removal
- (2) Bond of removal
- (3) Transcript of proceedings at trial
- (4) Order extending time for filing record
and docketing appeal
- (5) Order as to original exhibits
- (6) This stipulation

Dated this 13 day of January, 1947.

JONES & BRONSON,
Attorneys for Plaintiffs.
CLARKE, CLARKE &
ALBERTSON,
Attorneys for Defendant,
Franklin Fire Insurance
Company.

[Endorsed]: Filed Jan. 13, 1947. [63]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I. Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 63, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designations of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with Reporter's Transcript of Testimony, the original of which is transmitted herewith as

part of the record on appeal, constitute the record on appeal herein from the judgment of dismissal, dated September 18, 1946, of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Title 28, U.S.C. Supp. IV, Sec. 555) for making record:

60 pages at 10c (copies furnished).	\$ 6.00
1 pages at 40c .....	.40
Notice of Appeal	5.00

Total\$11.40

I further certify that the foregoing amount of \$11.40 has been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 30th day of January, 1947.

[Seal]

MILLARD P. THOMAS,
Clerk,

By /s/ PERCY MADDUX,
Deputy. [65]

In the District Court of the United States for
the Western District of Washington,
Northern Division

No. 1563

J. W. VAN METER, et al.,

Plaintiffs,

vs.

FRANKLIN FIRE INSURANCE CO.,

Defendant.

Before: The Honorable Howard C. Speakman,
Judge.

September 16, 1946, 10:00 a.m.

Appearances:

Albert Olsen, Esq., and Story Birdseye, appearing for the Plaintiffs.

George W. Clarke, Esq., appearing for the Defendant.

Whereupon, the following proceedings were [1*]
had:

* Page numbering appearing at foot of page of original certified Transcript of Record.

PROCEEDINGS

(Opening Statement delivered on behalf of the Plaintiff.)

Mr. Olsen: I would like to call Mr. Van Meter.

J. W. VAN METER

a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

The Court: I take it, Mr. Olsen, that practically everything is admitted in the Answer except the question of agency and loss?

Mr. Olsen: That is about it.

The Court: They admit the issuing of the policy, and the fire and the proof of loss and all of those things—the ownership in the plaintiff?

Mr. Olsen: Yes.

The Court: They admit the American Discount Company and Lipman and Esfeld occupied the same offices; and they admit that they were the agents of the company as they allege, having only the power existing under the statute of the State of Washington, by virtue of such license. [2]

Mr. Olsen: Yes.

The Court: And they say that the American Discount Company requested the policy.

Mr. Olsen: Yes.

The Court: So we can avoid the loss of a lot of time by introduction of the policy in evidence.

Mr. Olsen: That is what I was going to do. Will you mark it for identification?

(Testimony of J. W. Van Meter.)

(Policy of Insurance marked as Plaintiffs' Exhibit No. 1 for identification.)

(Loss Payable Clause marked as Plaintiffs' Exhibit No. 2 for identification.)

The Court: Let both be received.

(Plaintiffs' Exhibit No. 1 received in evidence.)

(Plaintiffs' Exhibit No. 2 received in evidence.)

[Plaintiffs' Exhibit No. 2 set out on page 46.]

Direct Examination

By Mr. Olsen:

Q. Will you state your name?

A. John Van Meter.

Q. You are one of the plaintiffs in this action, are you? A. Yes. [3]

Q. What is your business, Mr. Van Meter?

A. Logging and trucking.

Q. How long have you been engaged in that business? A. Since 1932.

Q. When did your dealings with the American Discount Company and Lipman and Esfeld first commence?

A. About five years ago, somewhere in that neighborhood.

Q. What was the nature of those dealings?

A. Financing trucking equipment or machinery, borrowing money to either finance or purchase equipment.

(Testimony of J. W. Van Meter.)

Q. What person did you deal principally with in your dealings with those two concerns?

A. Mr. Esfeld—Sol Esfeld, that.

Q. Where is the place of business of those two businesses? A. Smith Tower, Seattle.

Q. What floor? A. Second floor.

Q. Can you describe the entrance and the office space occupied by those two concerns?

A. Yes, they all occupy one large room.

Q. What names do they have on the door?

A. I believe it is "American Discount Company" "Lipman and Esfeld."

Q. Say prior to April, 1944, had you received a policy issued by Lipman and Esfeld, signed by Sol Esfeld? [4]

A. Had I received a policy?

Q. Yes.

A. At different time I believe I have.

Q. What was your understanding as to Sol Esfeld's interest in Lipman and Esfeld?

A. I supposed that he was the owner or one of the partners.

Q. Do you know where Mr. Esfeld's desk is in the American Discount Company or Lipman and Esfeld's office? A. Yes.

Q. Does Abe Goldman have a desk right nearby?

A. Yes, he does.

Q. How far away?

A. About four or five feet.

Q. Do you know where Mr. Pinch's desk is?

(Testimony of J. W. Van Meter.)

A. It is across the room, in the other part of the lobby.

Q. Going into their office, do you have any means of knowing whether or not, when you go to the desk you are talking with a representative of Lipman and Esfeld or American Discount Company.

Mr. Clarke: Objected to as calling for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Olsen) Is there any sign or indication present there to direct you as to whether or not Lipman and [5] Esfeld occupy any particular part of the space, and the American Discount Company some other particular part of the space?

A. No.

Q. What developed in early November, 1944, to cause you to go to their office?

A. I wanted to buy machinery. That was at the time I bought this tractor and arch, and wanted to get the money to finance it with.

Q. Did you consummate arrangements to finance you in the purchase of this International Harvester tractor? A. That is right; they did.

Q. Do you recall how much additional money was advanced at that time for that purpose?

A. I think I paid somewhere in the neighborhood of \$4,000.00 out of my pocket and borrowed the balance from them.

Q. Was it customary in your dealings with them for them to ask for insurance?

(Testimony of J. W. Van Meter.)

A. They generally always wrote the insurance themselves.

Q. At that time, as near as you can recall, tell the Court what was said about insurance on this equipment?

A. Well, Sol Esfeld and I sat down at the desk and the insurance was drawn. He asked me what I wanted in insurance and I told him the worst risk on tractors [6] that were used in the woods was either moving—damage to the tractor by dumping it off of a truck while you were moving it or a tree falling on it or a forest fire; that nobody would steal it, and if it was covered with those three hazards, why, I would be satisfied. That was definitely understood right there. I had also done most of the business with Esfeld and never had had any reason to question it before.

Q. Speak so that the reporter and Judge can both hear.

A. I borrowed the money and signed the contract. He said that the insurance would be made up and a copy would be mailed to me.

Q. Was it explained to you then or sometime prior to that time by Mr. Esfeld as to the types of policies they customarily issue with respect to different classes of equipment? A. Yes.

Q. Could you explain what those types were with reference to the particular type of equipment?

A. Well, on this particular tractor, there were two policies as I remember it, the Marine policy is a policy that is supposed to be good any place in

(Testimony of J. W. Van Meter.)

any State. Because that was the policy I wanted on this, I wasn't interested in what the other one was. [7] Possibly it demanded a smaller premium.

Q. Do they issue a different type of policy covering trucks and trailers, that is, equipment which moves about?

A. Yes. There is a short-rate policy, if your truck is hauling logs within a 25 or 50-mile radius you can get a policy with a lot less premium than one which is good any place in the State.

Q. But it wasn't that type of insurance which you were going to have on your tractor?

A. No.

Mr. Clarke: Objected to as leading.

The Court: Sustained. Go ahead.

Q. (By Mr. Olsen) Was another type of policy to be issued with reference to the tractor equipment? A. Yes.

Q. What type of insurance was that to be?

A. That was a Marine policy that was supposed to be good any place.

Q. During the course of your dealings with the American Discount Company and Lipman and Esfeld, at what different places had you logged?

A. I was logging in Skagit County; that is up north, up near Bellingham, when I first started doing business with [8] them. I had logged at Aberdeen and Hoquiam down on the harbor for about six months, and about two years at Morton and Randall, Washington and Lewis County; about six

(Testimony of J. W. Van Meter.)

months out here at Enumclaw which is in King County. Then I operated trucks in Olympia for some time, logging trucks; that is, maybe for a year and at the time I would have three of my trucks working in one part of the State and three of them in another part of the State on different jobs.

Q. The firms of Lipman and Esfeld and American Discount Company, did they know of your having done business in different parts of the State?

A. Yes.

Mr. Clarke: Objected to as calling for a conclusion.

The Court: Sustained.

Q. (By Mr. Olsen) After you had been in there about November 10, 1944, in the office of Lipman and Esfeld, did you receive any advice about the issuance of insurance covering this equipment?

A. No.

Q. But you understood that it had been issued?

A. Yes.

Q. Did you ever see the policy? [9]

A. Never.

Q. That is, up to the time of the fire?

A. No. The first time I ever saw the policy was about two weeks after the fire.

Q. Did you have occasion to have some further discussions with Mr. Esfeld and the—relative to the move down to Oregon some time in March or say April, 1945? A. Yes.

Q. Were you at their office?

A. I was.

(Testimony of J. W. Van Meter.)

Q. More than once during that period?

A. Yes.

Q. How many times?

A. I was there at least two or three times, and then on up to—they generally referred me to Pete Thomas. That is a fellow that I believe has something to do with the American Discount Company. Most of my business with them was approved by Thomas.

Q. And also by Mr. Esfeld?

A. That is right.

Q. Can you identify the approximate time of those visits?

A. Well, it was during the late fall before I had bought this "TD-18 tractor," and again in the early spring after I bought the other tractor. I had seen them a number of times about financing this other equipment [10] for me when I moved to Oregon.

Q. When do you recall you first brought up the subject of your moving to Oregon?

A. Sometime in August.

Q. Of what year?

A. '45. You see, I had a certificate from Washington, D. C., to buy a new truck, and that truck and trailer was going to cost me about \$11,000. There were a lot of other fellows who would want that same truck that had certificates and I had to get the money to buy it. I made a payment on the truck to hold it with the intentions of buying it later. I saw this outfit several times to get the money.

(Testimony of J. W. Van Meter.)

The Court: What do you mean you had to have the certificate?

The Witness: During the war we had to have a Certificate of Necessity.

Q. (By Mr. Olsen) When did you say your first discussions were with these two firms, relative to moving down to Oregon?

Mr. Clarke: Objected to "as to the two firms." I don't recall that you said "two firms."

Q. (By Mr. Olsen) When do you recall were your first discussions [11] with Sol Esfeld relative to moving down to Oregon?

A. Well, it was sometime—possibly a month or six weeks before they financed this "TD-18" tractor.

Q. In other words, as early as October, 1944?

A. Yes.

Q. Then you had discussed with Mr. Esfeld the prospect of moving down into Oregon, even before you obtained this tractor?

Mr. Clarke: Objected to as leading.

The Court: Sustained.

Q. (By Mr. Olsen) Did you have occasion to visit their office sometime in March, 1945?

A. Yes.

Q. What was the occasion for that visit?

A. That was to borrow money to buy this new truck with.

Q. What new truck?

A. I was getting a new Mack truck. That was the one that I had the money paid on and the cer-

(Testimony of J. W. Van Meter.)

tificate for; and to see if they wouldn't re-finance my contract and buy that additional equipment so that I could take this job in Wallowa, Oregon. I had a nice job over there.

Q. Did you tell them that you had a job to log in Wallowa, Oregon? [12]

A. I did.

Q. Did you have more than one discussion with them about that additional financing in March, 1945?

A. Yes.

Q. What was the result of those discussions with reference to their making the additional loan?

A. Well, they didn't like to do it because I would be out of the State—and so far out of the State. Wallowa is quite a long ways away. They suggested that I try to get it re-financed in Oregon some place if I was going to leave the State.

Q. What did you do then about getting finances some place else?

A. I went to Portland, and in two or three days I was able to borrow the money?

Q. Did you then move your equipment down in Oregon?

A. I did.

Q. Approximately when?

A. Sometime in May, we moved it over there by truck. I remember it rained.

Q. Are you sure it was in May?

A. It was the last of April or the first of May, sometime along in there.

Q. Do you remember when your loan with the American Discount was paid off? [13]

(Testimony of J. W. Van Meter.)

A. I was just a few days before we moved.

Q. It was just a few days before you moved?

A. Yes. You see I wouldn't move the equipment out of the State until this finance company was satisfied up here.

Q. So if the evidence shows that they were paid off about April 20, then you would say what as to the time of your moving?

A. Between April 20, and the 10th of May would cover it easy enough. We were several days getting over there.

Q. In any of those times during March and April that you were in the office of the American Discount Company, and Lipman and Esfeld, did you have occasion to talk with Morton Pinch or Abe Goldman? A. Yes.

Q. Had you become fairly well acquainted with them? A. Yes.

Q. You became fairly well acquainted with them about this time in the sense that you could recognize them? A. Yes.

Q. And they knew you, did they?

A. Yes.

Q. Did you have any discussions with either of those men?

A. One of them tried to sell me a life insurance policy and wrote me about it afterwards. [14]

Q. Do you recall approximately when that discussion with one of them was about life insurance?

A. It was sometime in March. I am sure it was in March.

(Testimony of J. W. Van Meter.)

Q. Did you have a rather extensive——

Mr. Clarke: Objected to as immaterial. Excuse me. Go ahead and finish your question.

Q. (By Mr. Olsen) Did you have an extensive conversation with him at any time?

A. Well, I explained to him——

Mr. Clarke: I will object to that as immaterial as far as any issues of this case are concerned.

Mr. Olsen: If your Honor please, Mr. Goldman is one of the partners of Lipman and Esfeld. Any discussion between them at about that time is material, I think.

Mr. Clarke: It is about life insurance as I understood the question and answer.

The Court: Was there anything in the discussion about this insurance on this equipment or was it all about life insurance?

The Witness: We talked there for about a half an hour. I was explaining to him about my job in Oregon, and that I expected to make some money. Then he suggested that I buy some more life insurance, [15] not knowing that I already had a policy up here with Northern Life that was all I could afford. Out of courtesy to them I was letting him go ahead and explain the thing to me. He figured out a set of papers in case I wanted to buy some life insurance. I was very much enthused about this job in Oregon. When you tell them fellows that you are going to make some money they are going to sell you some insurance if they can, you see.

(Testimony of J. W. Van Meter.)

Mr. Clarke: I move that the answer be stricken as immaterial and not bearing upon the issues.

Mr. Olsen: If your Honor please, I want to bring out the fact that members of the firm knew he was going down to Oregon. I think it is material in that respect.

The Court: The answer may stand.

Q. (By Mr. Olsen) During this time in March and April, 1945, what was your understanding as to who were the owners of Lipman and Esfeld?

Mr. Clarke: Objected to as calling for a conclusion as to what his understanding was.

The Court: Sustained.

Q. (By Mr. Olsen) You knew, did you, that Mr. Esfeld had [16] been a partner or owner of Lipman and Esfeld prior to that time, did you not?

A. I did.

Q. Had you been informed or received any information to indicate to you that there had been any change in that status? A. No.

Q. Did you receive a letter from Lipman and Esfeld sometime in May, 1945, after you moved down there?

A. Sometime the first week in May I received correspondence from them at Wallowa. I wrote them from Wallowa.

(Correspondence marked as Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Olsen) I ask you if that is a letter that you received in the mail? A. Yes.

Q. With the attachments also received?

(Testimony of J. W. Van Meter.)

A. Yes.

Mr. Olsen: I offer them in evidence.

Mr. Clarke: For the purpose of the record, I object to the introduction of the exhibit or any part thereof on the ground that they are utterly immaterial to the issues in that particularly that an insurance contract may not be extended to cover [17] in a different locality by the doctrine of waiver or estoppel.

The Court: What is the purpose of that offer?

Mr. Olsen: If your Honor please, I will connect it up later with some correspondence from Granning & Treece. It is to show that they had—for one thing, of course, there is a specific reference there—this statement of account here which accompanies this letter, includes a statement of the premium on this policy. At that time apparently the premium was unpaid and I will show that they had knowledge he moved down to Portland; and that they with the knowledge of the fact of his moving down there were billing him and asking him to pay the premium on it. I think it connects up with some later correspondence that will be offered.

Mr. Clarke: I think a further observation, if your Honor please, that there is no contention that the premium charged was otherwise than the premium for the original coverage which was restricted to the State of Washington.

The Court: I will reserve ruling on that until we see the other correspondence in that connection.

(Testimony of J. W. Van Meter.)

Q. (By Mr. Olsen) Did you make a reply to this letter? [18] A. Yes, I think so.

Q. Did you keep a copy of your reply?

A. No.

Q. Do you recall what the substance of your reply was?

A. When they billed me for this money, and I had just moved to Oregon—I was short of money, and I told them that if I owed the balance, that they would get the money in a short time probably.

Mr. Clarke: We have the letter to which counsel is referring. I think it would be better procedure, rather than to have oral recollection—that we produced the letter.

(Letter marked as Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Olsen) I will ask you if this the letter than you wrote in reply to that?

A. Yes.

Q. That is Plaintiff's Exhibit 4?

A. Yes.

Mr. Olsen: I offer that in evidence.

Mr. Clarke: The same objection as to the other exhibit.

Mr. Olsen: That is a letter addressed to them in which he says he had had considerable expense in moving down here. It is to show that they had specific [19] knowledge that he was in Oregon at the time and that he had moved his quipmnt there.

The Court: Exhibits 3 and 4 may be received.

(Testimony of J. W. Van Meter.)

(Plaintiffs' Exhibit 3 received in evidence.)

[Plaintiffs' Exhibit 3 set out on pages 47 to 50.]

(Plaintiff's Exhibit 4 received in evidence.)

[Plaintiffs' Exhibit 4 set out on pages 50-51.]

Q. (By Mr. Olsen) I will ask you whether you heard again from Lipman and Esfeld later on—by correspondence, I mean.

A. Later than May?

Q. Yes.

A. I can't say.

(Letter marked as Plaintiffs' Exhibit No. 5 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiff's Exhibit 5, purporting to be a letter dated August 17, 1945, from Lipman & Esfeld, and ask you if you received that letter in the mail?

A. Yes. I received this letter, yes.

Q. You will note the first paragraph says, "This is in response to your letter of August 10." Does that refresh your recollection as to whether or not you wrote them on August 10? [20]

A. Yes. It was in August that we almost had a forest fire at Wallowa, Oregon. The fire warden got us up, me and my crew up all night fighting fire. The next day my wife and I had some discussion about our insurance. I believe I wrote to Seattle making some inquiries about it but I don't remember and I don't have any copy of my own letter.

Mr. Olsen: I offer this in evidence.

(Testimony of J. W. Van Meter.)

The Court: When was the re—in October?

The Witness: In October—the one in California. We almost had a fire in Oregon before we moved to California.

Mr. Clark: The same objection as to the offer and to the effect, further than these are all immaterial in that they have to do—not with the original issuance of the policy—but with the situation which developed later; also that that letter had to do apparently with other policies.

The Court: It may be received.

(Plaintiffs' Exhibit 5 received in evidence.)

[Plaintiffs' Exhibit 5 set out on pages 51 to 53.]

Q. (By Mr. Olsen) Did you later have occasion to move your equipment down to Redding, California? A. Yes.

Q. Approximately when did you move your equipment down there? [21]

A. In September, around the 1st of September.

Q. Did you have a fire affecting this equipment?

A. Yes.

Q. Will you relate to the Court the circumstances of the fire?

A. It was in October; the morning of October 4, we went to work at 4:00 o'clock in the morning. The woods were on fire and the spar tree. The tractor was already destroyed and a truck and trailer belonging to a fellow that was hauling for me that was left in the woods the night before was completely destroyed. There were about 150 forest

(Testimony of J. W. Van Meter.)

service men with bumper wagons and the company's crew were there fighting the fire.

Q. Where was your tractor, this International Harvester tractor situated at the time—that night, that is?

A. It was about two hundred or three hundred feet from our spar tree where we had loaded logs on trucks.

Q. Was it near brush or logs?

A. Yes. The day before a brake lever that controls the truck broke. That is how come we left it in the brush. We had to turn the logs behind it.

Q. And the fire occurred on the night of what?

A. The night of October 3rd—around midnight the Forest [22] Service told us they could see it from their towers. It was about two hours later they got there to fight it with their equipment.

Q. Can you describe the condition of the tractor after the fire?

A. It was badly burned. We believed that all of the oil cells were gone in it. Everything exterior was completely burned away, that is, the fuel pump and the magneto and batteries and seats. You see, just before we stopped the tractor we had filled the Diesel tank. It holds about sixty gallons of Diesel. When the bulb on the side of the tractor broke, all of that Diesel oil ran down and fed the flames. There was about four or five inches of pine needles, so it was setting in a bed of coals. The iron was hot like a stove-top. It would just sizzle. There was reason to believe that the temper had gone out of

(Testimony of J. W. Van Meter.)

a lot of the parts of the machine. It was a sorry looking mess. And all of the rigging behind it was completely burned. There was no hope for recovery on any of that.

Q. What was the appearance after the fire as to whether or not it had been just a mild fire or an extremely hot fire as far as it applied to this tractor?

Mr. Clarke: Objected to as having already been [23] answered.

The Court: Go ahead and answer it.

A. I would say that it looked extremely bad for the tractor because the truck had burned 60 feet away and was melted right to the ground. The flame was laying right in the ground. They were both in the same fire.

Q. What has been your experience particularly with reference to buying and selling of tractors of this type and ascertaining their value?

A. Well, I have owned a number of tractors myself. In the seven or eight years that I have been in the woods I have hauled lots of tractors and seen the deals made on lots of them, both new and used.

Q. Are you familiar with the OPA ceiling price on a tractor of this type? A. Yes.

Q. What was the OPA ceiling price on a tractor of this type at the time of the fire?

A. \$8850.00.

Q. Is that a used tractor? A. Yes.

Q. What would you say as to the condition of this tractor just before the fire?

(Testimony of J. W. Van Meter.)

A. It was in good condition. I had just taken it out of [24] the shop. I had spent \$600 on it and it was working perfectly. I had had some things overhauled on it and I had worked it three days when it burned up.

Q. Have you been able to form an opinion as to its probable salvage value after the fire?

A. Yes. If I had received an offer of around \$3500 I would probably have taken it for the salvage.

Mr. Clarke: I object to what he would have accepted as improper. It is a question of what the value was. I move that the answer be stricken.

The Court: It may be stricken.

Q. (By Mr. Olsen): What was your opinion as to the value of the tractor after the fire?

A. \$3500 or \$4000, in that neighborhood.

Q. On what do you base your opinion in that respect?

A. On the value of it after it would have been repaired and what it would have cost to repair it.

**NARRATIVE OF PART OF J. W. VAN
METER'S TESTIMONY APPEARING AT
PAGES 25 THROUGH 50, LINE 7**

"I started to repair the tractor in March following the fire. Plaintiffs' Exhibit 7 is a list of parts and labor furnished by J. G. Bastain of Redding, California, in the repair of the tractor. I paid the amount of this bill namely, \$2,652.68. Plaintiffs'

(Testimony of J. W. Van Meter.)

Exhibit 8 is a statement of Bastain Equipment Company of charges for bringing the tractor in from the woods where it was destroyed and dismantling the tractor to determine the amount of the damage. I paid the total of the items shown on Plaintiffs' Exhibit 8 in the sum of \$340.93 to J. G. Bastain. Plaintiffs' Exhibit 9 is a bill of goods from Howard Cooper Corporation of some parts for Isaacson bulldozer that I had on hand before the tractor burned up and these items went into its reconstruction at Bastain's. (Items listed in Exhibit 9 total \$40.52). I also had a crankshaft on hand before the fire which cost \$158.00 which Bastain installed in the machine. Plaintiffs' Exhibit 11 is a bill of goods installed in the tractor and parts, \$333.25, and the labor was \$155.19 making a total of \$488.44. That was parts that were damaged by fire and that had to be installed in the tractor before it could be used. That is in addition to the larger bill [59] of about \$2,600.00. The work listed in Plaintiffs' Exhibit 11 was work performed after I took it out of Bastain's hands. This work was necessary to put it in working condition. I paid this bill in the total sum of \$488.44. I helped Bastain and Company in making the repairs and in obtaining parts. One fellow employed by me and myself—we worked two weeks, Saturday and Sundays, in rebuilding the tractor. I made telephone calls and a trip to Eugene and Portland. I got a list. Telephone calls and the trip to Eugene

(Testimony of J. W. Van Meter.)

and Portland and the wages I paid to this helper, before we got the cat, and myself, and the expenses for that two-week period that we spent in Redding. \$869.50 is the total of the whole thing.” [60]

Q. (By Mr. Olsen) After the losses occurred I understand you to say that you contacted Lipman & Esfeld?

A. Yes.

Q. What did they tell you?

Mr. Clarke: I object to that until it is determined whether this was orally or in writing.

Q. (By Mr. Olsen) How did you contact them?

A. Telephone.

Q. Who did you contact?

A. I talked to Mr. Pinch.

Q. What did they tell you?

A. To have Alherne of the Fire Adjustment Bureau in California make the adjustment of the fire immediately they would send a written confirmation of that order.

Q. Did he tell you that or was that told to you by someone talking from the branch office of the Franklin Fire [50] Insurance Company here in Seattle?

A. That could have been. I have made calls to both companies—several of them, and telegrams (Telegram marked Plaintiffs’ Exhibit 13 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs’ Exhibit 13, and ask you what that is.

A. This is a telegram that I received from Lipman & Esfeld right after the fire.

(Testimony of J. W. Van Meter.)

Mr. Olsen: I offer this in evidence.

Mr. Clarke: Objected to as being irrelevant, incompetent, and immaterial and not bearing upon the issues. The fact that the company may have assigned an adjuster to ascertain the facts as to the extent of his loss does not in any way affect the coverage of the policy.

Mr. Olsen: It is designed to show, Your Honor, of course, that the agent who wrote this policy—the idea of this being limited to any particular territory, it never occurred to them. And even at that late date they raised no issue about it.

Mr. Clarke: Even if it should appear, if Your Honor please, that they had overlooked the policy limitation, that fact would not operate to extend the coverage of the policy down to a loss in California. [51]

The Court: It may be received.

(Plaintiffs' Exhibit 13 received in evidence.)

[Plaintiffs' Exhibit 13 set out on page 53.]

(Copy of letter dated October 30, 1945, marked as Plaintiffs' Exhibit 14 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs' Exhibit 14 and ask you to state what that is?

A. This is a copy of a telegram from Lipman & Esfeld to Granning and Treece.

Q. You don't mean a telegram, do you?

A. No, a letter.

Q. Is that a copy you received in the mail?

A. Oh, yes.

(Testimony of J. W. Van Meter.)

Q. Signed by Morton Pinch, Lipman & Esfeld?

A. Yes.

Mr. Olsen: I offer that in evidence.

Mr. Clarke: The same objection as to the last exhibit.

Mr. Olsen: The policy referred to there, Your Honor, is this policy.

The Court: This is dated October 30. Was that before or after the fire?

The Witness: After the fire. It expired [52] after the fire.

Mr. Clarke: Are you referring now to the date of the letter or the date of the expiration of the policy?

The Witness: The expiration of the policy was after the fire. And of course the letter notifying me of it was before.

The Court: It may be received.

(Plaintiffs' Exhibit 14 received in evidence.)

[Plaintiffs' Exhibit 14 set out on page 54.]

(Copy of letter marked as Plaintiffs' Exhibit 15 for identification.)

Q. (By Mr. Olsen) Calling your attention again to Plaintiffs' Exhibit 4, I will ask you: Did you receive a reply to that letter or a letter in response to that one?

A. Yes, I believe I did; yes.

Q. Have you been able to locate that letter that you received in reply?

A. I don't think so.

(Testimony of J. W. Van Meter.)

Q. You have searched your files for it?

A. Yes.

Q. And you have not been able to locate it?

A. No.

Q. I hand you Plaintiffs' Exhibit 15 and ask you to look [53] that over and state whether or not that is a correct copy of the letter you received in reply?

A. Yes, it is quite evident that this is the reply.

Q. Was the copy of that letter that is attached to it along with it? A. Yes.

Q. This is going back a little bit to some previous testimony, Your Honor. A. Yes.

Mr. Olsen: I offer Plaintiffs' 15 in evidence.

Mr. Clarke: The same objection, that is, that it is not material to the issues and is irrelevant.

Mr. Olsen: That, Your Honor, is a reply to a letter you saw a minute ago. It is not connected up with the present testimony but relates to his previous testimony.

The Court: It may be received.

(Plaintiffs' Exhibit 15 received in evidence.)

[Plaintiffs' Exhibit 15 set out on pages 55 to 57.]

Q. (By Mr. Olsen) I have asked this before but I want to ask it again: Did you at any time prior to this loss on October 4, know of anything relative to the change in the status of the ownership of Lipman & Esfeld? A. No. [54]

Q. State whether or not you understood that Mr. Sol Esfeld still represented Lipman & Esfeld?

(Testimony of J. W. Van Meter.)

A. I supposed that he did.

Mr. Clarke: Objected to as a conclusion so far as his understanding was concerned.

The Court: Sustained.

Q. (By Mr. Olsen) Did you ever have this policy on which the suit is brought in your possession or did you ever see it prior to the time of the fire?

Mr. Clarke: I object to that as being immaterial in that the law says it is his duty.

The Court: Whether or not he ever saw the policy?

Mr. Olsen: Yes.

The Court: Overruled.

A. I never saw it until about two weeks after the cat was burned up, no, sir.

Q. (By Mr. Olsen) That was because it was in the hands of the American Discount Company first and then Granning & Treece later?

A. That is right.

Mr. Olsen: I think that is all. [55]

Cross Examination

By Mr. Clarke:

Q. Mr. Van Meter, at the time you arranged this financing with the American Discount, shortly prior to the time of the issuance of this policy, how many pieces of equipment were involved in the re-financing?

(Testimony of J. W. Van Meter.)

A. I consolidated—or rather all of the equipment that I had was consolidated into one contract.

Q. How many pieces would that be, roughly?

A. That would be two logging trucks and two trailers and an automobile and two tractors and a logging donkey and a 10-yard scraper bug, and a lot of miscellaneous tools and rigging.

Q. That was all mortgaged at the time then to the American Discount Company? A. Yes.

Q. You had some policies of insurance covering some of this equipment at the time?

A. Yes, I did have; and they were issued by Lipman & Esfeld.

Q. Those policies were also in the possession of the American Discount Company, were they not?

A. I don't believe that all of them were, no. At times I have had policies or a copy.

Q. In so far as the original policy is concerned, though, [56] did not the American Discount Company hold all of those policies?

A. Not always.

Q. At the time you did this re-financing, did you not deliver to them certain policies? A. No.

Q. Did they then have in their possession certain policies covering other of this equipment?

A. I believe they did; I believe so.

Q. You knew when this Franklin policy was issued it was to be sent to the American Discount Company, did you not?

A. I supposed that I would get a copy of it.

(Testimony of J. W. Van Meter.)

Q. You knew, did you not, however, that the original policy would be kept by the American Discount?

A. I knew that they would keep a copy for their own protection, sure; but I expected to receive a copy for our files.

Q. Did you not receive one? A. No.

Q. Did you ever ask for one?

A. I guess it never occurred to me because I went over the provisions for the insurance and the need for having it never occurred to me.

Q. This equipment,—what do you call this particular piece [57] of equipment that was involved in the fire down in California?

A. A “TD-18” International Tractor with an Isaacson dozer and a Carco winch.

The Court: What is that please?

The Witness: A TD-18. That is the biggest International tractor built. It is equipped with an Isaacson bulldozer and a Carco logging jamb on the back.

Q. (By Mr. Clarke) When did you acquire this equipment?

A. I bought it from the M. P. Mutter Construction Company of Seattle, and took it off of a dock over here in Seattle, and financed it with the American Discount and insured it all the same day and loaded it on the truck and left town. Sol Esfeld sent a fellow out to examine it, to check its value.

Q. Was it new or used equipment?

A. Used.

(Testimony of J. W. Van Meter.)

Q. What did you pay for it?

A. \$8850.00 for the tractor with a dozer and the drum and an additional \$2000 for a 8-yard Isaacson scraper bug.

Q. Did you know where the equipment had been used prior to the time you got it? [58]

A. Yes.

Q. Where had it been used?

A. In Alaska.

Q. Do you know whether or not it had been used on this Alcan Highway?

A. No, it was used on an airstrip; at least that is what was told me.

Q. Do you know in what part of Alaska?

A. No, I can't say for sure. They bladed an airstrip down was all. It hasn't seen any hard use.

Q. I will hand you Plaintiffs' Exhibit 7 which is the repair bill from Bastain and I will ask you whether or not that bill did not include a complete mechanical overhaul of the equipment?

A. No, because some of the parts that I furnished are not on here. If they were, then it would be complete.

Q. I think you missed the point of my question. You had been using this equipment for some period of time in connection with your logging operations?

A. Yes.

Q. Is it not correct that certain of these parts had been worn so that it was necessary to do some work on it to put it back in mechanical condition?

(Testimony of J. W. Van Meter.)

A. Do you mean weren't there some parts on here which were not damaged by fire which were involved in the [59] tractor, is that what you mean?

Q. Was there mechanical work done here which was not necessarily by reason of the fire?

A. Yes.

Q. Will you certify as to that? A. Yes.

Q. You have gone over each one of these items carefully and are prepared to testify that none of these items on here would have been necessary had it not been for the fire?

A. No, none of them. The tractor was working perfectly when it burned up and we would have run it some time. Of course, machines are subject to a breakdown. You can have a brand new tractor and break it down the first day, you know.

Q. How would a crankshaft become damaged by fire?

A. It could get too hot. The fact is—and his mechanics fixed the crankshaft and they believed—because the bearings were burned up and everything else in it, they believed it would be foolish to put new bearings around the old crankshaft and because I had one on hand, to do a complete job we put it in.

Q. This bill also included putting on a new set of caterpillar tracks, did it not?

A. No, it did not include any new tracks. I took delivery [60] of the tractor with the old tracks.

Q. What is the item on page 7?

A. That is probably a set of used rails that I bought as extras for \$100. That is \$100 for one set of used track rail.

(Testimony of J. W. Van Meter.)

Q. How would that have been made necessary by the fire?

A. No, that isn't. If that is in that total it certainly is an oversight. Because that one item is——

The Court: How much is that item?

The Witness: That is \$100.00.

The Court: That was not caused by the fire.

The Witness: No. That is a set of extra rails.

The Court: All right.

Q. (By Mr. Clarke) Did I understand you to testify on direct examination that had you started this repair work promptly after the fire that it could have been accomplished much more easily?

A. That is my opinion and that is J. G. Bastain's opinion. In fact, we are all agreed that because of the delay it took longer because those strikes came on afterwards.

Q. How much additional cost do you estimate was caused by the fact that the repairs were delayed?

Mr. Olsen: There is nothing to indicate that there would be any additional cost by reason of the [61] delay. He just pointed out that there was more delay by reason of the intermediate delay.

Mr. Clarke: I understood him to answer differently. I think the question is well taken.

The Court: I didn't understand you.

Mr. Clarke: I submit the question is well taken. I understood him to state that there was an increased cost and I wanted to know what it was.

(Testimony of J. W. Van Meter.)

The Court: Is that a fact that there was increased cost by reason of the delay?

The Witness: The way this thing affected me it increased it immeasurably because this particular machine tied up everything else that I owned.

The Court: He is speaking of increased costs of repair though, are you not?

Mr. Clarke: That is correct.

The Court: Was that increased by reason of the delay?

The Witness: I don't imagine that that was increased a great deal by reason of the delay itself. There was some but I don't just know what that would amount to.

Q. (By Mr. Clarke) Did the delay also make it necessary for you to go to considerable more expense in running [62] around to line these parts up?

A. Yes. Because at one time right after the fire, when Bastain prepared the original list of parts he had practically the whole thing in his shop at that time. Later he sold out most of those parts and wasn't able to replace them due to the strike.

Q. So that this extra expense incurred by yourself and your employee and going to Portland, and other places, amounting to approximately \$800 was principally made necessary by the fact that the repairs were not started promptly after the fire?

Mr. Olsen: I object to that on the ground it assumes something that was not testified to. This extra expense of going to Portland did not amount to

(Testimony of J. W. Van Meter.)

\$800. The expense of going to Portland amounted to several items running a little bit over \$100.00.

Mr. Clarke: I am asking the question. If he answered differently why——

The Court: Answer the question.

A. The bill of parts was itemized what it was for. It involved some parts and working on the tractor and the telephone calls and everything incidental to getting it back in shape.

Q. The question was: Was that made necessary due to the fact that the repairs were not started when Bastain [63] had all of the parts there and could have gone ahead?

A. I would say if the insurance company would have assured him of the money so he could go ahead on it, that we could probably have gotten away from some of that expense, yes.

Q. Wouldn't you have gotten away from all of that expense?

A. Well, that is a condition that didn't happen so we wouldn't know. I wouldn't be concerned with that expense had it been that way because I would have had the machine and could have been logging with it.

Q. Now these parts that you went around to get,—and you have listed in separate accounts—are they not also included in Bastain's bill?

A. I would have to have both copies; I don't believe they are. They are not supposed to be. If they are, why, they will be credited to me.

(Testimony of J. W. Van Meter.)

Q. Well, do you mean they would be credited to you in that bill?

A. Yes. Yes, here is \$44.75 worth of them—that is part of them; that is a portion of them.

The Court: Are they included in that bill?

The Witness: Part of them are—not all of them.

Q. (By Mr. Clarke): There are some duplications, though, [64] in these bills are there not?

A. There are nine pieces here that he gave me credit for. If I remember right there were eighteen or twenty pieces that I paid for out of my pocket. The rest of them have got to show up on another statement.

Q. Didn't you go over these bills beforehand so they could be submitted as a direct statement?

A. Yes, sir.

Q. But there are still now, as submitted, some duplications? A. Yes.

Mr. Clarke: I have no further questions.

Redirect Examination

By Mr. Olsen:

Q. Will you look on page 7 of Exhibit——

A. That is where I am now. That is this small list of parts.

Mr. Clarke: Wait a minute. I do have another question.

(Testimony of J. W. Van Meter.)

Cross-Examination (Continuing)

(Photograph marked Defendant's Exhibit A-1 for identification.) [65]

Q. (By Mr. Clarke) I hand you some pictures which have been marked Defendant's Exhibit A-1 for identification and ask you if you recognize them as being pictures of this equipment taken two or three days after the fire?

A. Yes, sir; that is me sitting on the tractor. This is the first time I have got to see these pictures,

Q. You remember when they were taken?

A. Oh, yes.

Mr. Clarke: We offer them for the purpose of illustrating the type of equipment and the approximate condition after the loss, visually.

The Court: They may be received.

(Defendant's Exhibit A-1 received in evidence.)

Mr. Clarke: I have no further examination.

Redirect Examination (Continuing)

By Mr. Olsen:

Q. Referring to Plaintiffs' Exhibit 7 on the seventh page, I note there is listed a part, it says "Less parts listed above and purchased by Mr. Van Meter." Do you see that?

A. Yes; that is right.

Q. Those parts were furnished by you?

A. That is right. [66]

(Testimony of J. W. Van Meter.)

Q. And presumably are listed in the forepart of the list, is that right? A. Yes.

Q. Looking at that, it indicates, does it not, that he had deducted from his bill the parts furnished by you? A. Yes.

Q. So he has given you credit for parts furnished by you? A. That is right.

Q. And so in view of that do you think there is any duplication in that Exhibit 7 of parts that you furnished?

A. No, there would not be then.

Q. Speaking of the ability of Mr. Bastain to repair the tractor promptly in its relation to avoiding some expenses, what, if any, expenses could have been avoided by that; that is, I mean actual expenses you have testified to here?

A. Would you repeat the question please?

Mr. Olsen: Strike the question.

Q. Outside of the expenses of the trip to Portland, would it have been possible to have avoided any of the expenses that were later incurred?

A. Yes; if he would have got to go ahead on the tractor and put it together when he had the parts earlier in the winter.

Q. You might have avoided that expense of the trip to [67] Portland? A. Yes.

Q. But you couldn't have avoided any of the other expenses? A. No.

Mr. Clarke: I object to that as being leading.

Q. (By Mr. Olsen) Could you have avoided any of the other expenses? A. No.

(Testimony of J. W. Van Meter.)

Q. Such as your own time and so on?

A. No.

Q. When Mr. Bastain made an estimate of the cost of repairing this, do you recall what his estimate of the labor charge would be?

A. It is in the neighborhood of \$2,000.

Mr. Clarke: I object to that as hearsay and not the best evidence.

Mr. Olsen: I asked him if he recalled.

Mr. Clarke: He started to say the amount.

The Court: Sustained.

A. Yes, I do recall it.

Q. (By Mr. Olsen) Do you recall what the approximate amount of the labor expense was made by Mr. Bastain after the fire? [68]

Mr. Clarke: I object to that as hearsay.

The Court: Sustained.

Q. (By Mr. Olsen) Calling your attention to page 8 of Exhibit 7, there is an item there of total labor of \$665.00; is that a relatively small labor charge?

A. Yes. This is the labor for the mechanic that was employed by the Bastain Equipment Company. The reason why it took so little is because the fellow employed by me and myself worked for two weeks on it. That is what cuts down the labor.

Q. In other words, you did most of the labor in repairing it?

A. Yes, we had to do a lot of mechanical work on that machine over again. He had a lot of stuff put together backwards.

(Testimony of J. W. Van Meter.)

Mr. Olsen: That is all.

Mr. Clarke: No further questions.

The Court: Mr. Van Meter, you didn't request this insurance policy, as I understand it was done by Lipman and——

The Witness: Esfeld; Sol Esfeld.

The Court: It was done by them?

The Witness: Yes.

The Court: Now, did you ask them to get [69] insurance for you?

The Witness: Yes; yes—Sol Esfeld.

The Court: Did you designate the company?

The Witness: I didn't designate any company. Sol Esfeld and I sat down at his desk like we always did. I have done lots of business with him—and talked over insurance.

The Court: You didn't designate any particular company?

The Witness: No.

The Court: Tell me what was said as near as you remember between you and Mr. Esfeld about the kind of insurance you were buying.

The Witness: I wanted insurance to protect this tractor in case a tree fell on it while it was in the woods, or if we should upset it—if the truck driver should dump it off the truck while he was going around a curve or loading or unloading it and against fire. I knew of tractors that had been upset and I knew of tractors that had had trees pulled over on them with a line. Those are the three worst hazards. He said "The premium will be drawn that

(Testimony of J. W. Van Meter.)

way." The premium was \$238.50. I was always careful of figures in all the business I did with him. When I walked out of the office I expected the policy would be mailed. [70] I didn't think of it any more.

The Court: You used the term "Marine insurance" this morning?

The Witness: That is right.

The Court: There was some discussion about that?

The Witness: Yes.

The Court: What was the discussion about that as near as you can remember?

The Witness: A Marine insurance policy was a different policy than I had ever had on any of the trucks. They had sold insurance for a lot of different companies—they write for a lot of different companies and I can name a lot of them. I had had insurance from other agents, too. But this Marine was a special policy for this different type of equipment.

The Court: Did you ever hear of that insurance policy, the Marine policy, before this day when you talked with Mr. Esfeld?

The Witness: I can't say for sure that I had any policies before with them.

The Court: Do I understand you to say that he explained that to you?

The Witness: Yes.

The Court: What did he say that was? [71]

The Witness: That a Marine policy differed in

(Testimony of J. W. Van Meter.)

the one way that it was good any place; a Marine policy—what it suggested to me was for boats or heavy industrial machinery, or something of that nature to be moved.

The Court: Did he say anything about it covering property out of the State of Washington?

The Witness: I don't think so. I don't think it was discussed either way.

The Court: What I am getting at is what kind of insurance did you order.

The Witness: I wanted insurance that would be good any place.

The Court: What was said about that if anything by either of you or this other gentleman?

The Witness: Well, I told him and Pete Thomas,—I told,—the old man Pete Thomas was a friend of mine and O.K.'d everything that ever happened with the company. For a long time, for at least a year before this—that I was going to move the operation into the State of Oregon.

The Court: You told him that?

The Witness: Yes.

The Court: During that talk with Mr. Esfeld?

The Witness: During the time when I purchased [72] this tractor.

The Court: You told Esfeld that?

The Witness: Yes.

The Court: That you were going into Oregon?

The Witness: Yes; but that it would not be soon—that it would be sometime during the following year.

(Testimony of J. W. Van Meter.)

The Court: Was that while you were talking about the insurance or at some other time?

The Witness: No; at that same time.

The Court: You told him that you were going with this equipment into Oregon?

The Witness: Possibly,—I had a short job logging in Lewis County but my next job would be in Oregon, and I made several trips into Oregon investigating lumber jobs, some with the Pope and Talbott Company, and some in the pine in eastern Oregon. Finally I decided on the eastern Oregon job. You see I was looking with a view to the future about this other job and trying to get them to finish it. I tried to let them know my plans in advance because I had been borrowing money from this company for a long time. That is the story.

The Court: What was said by either of you or him about insurance that covered you out of the State [73] of Washington?

The Witness: Well, I can't positively say just what was said.

The Court: Was there anything said about it?

The Witness: I just wouldn't want to answer that yes or no and be honest with you.

The Court: But you did tell him that you were taking this property into the state of Oregon?

The Witness: Yes. They knew for sometime that I was expecting to go to Oregon.

The Court: How long did that job last in Oregon?

The Witness: It lasted until—well, we spent the

(Testimony of J. W. Van Meter.)

summer on it. In the fall of that year, why, this firm that we had a subcontract with sold out to a firm in New York. They have long wet winters there and muddy roads and I had an opportunity to go on a job in California where the season is a little better.

The Court: When you moved to California, did you say anything to these insurance agents about it?

The Witness: I made a special trip in my automobile 350 miles to Portland to get permission from the finance company that was then financing me before I took the equipment out of the State. You see I owed them in the neighborhood of \$30,000 and it is not [74] good policy to pick up that machinery and put it on a train and take off without making arrangements.

The Court: Was that before you went to Oregon?

The Witness: California.

The Court: California?

The Witness: Yes. This Seattle company had lots of knowledge of my moving to Oregon, don't you see? The only people that I was obligated to for my move to California was the finance company that was financing my paper at that time.

The Court: That was the American Discount?

The Witness: That was the Granning-Treece Company of Portland. This Seattle firm had known all along and we had had correspondence. That had been exhibited—from Wallowa, Oregon.

The Court: While you were in California, and

(Testimony of J. W. Van Meter.)

before the fire, did you have any correspondence—well, when did you refinance again—before you left Oregon?

The Witness: Oh, yes. Before I moved to Oregon.

The Court: What?

The Witness: I say I refinanced before I moved to Oregon.

The Court: Oh, before you went to Oregon. [75]

The Witness: Yes.

The Court: I believe that is all.

Mr. Clarke: I have a couple of questions.

Recross Examination

By Mr. Clarke:

Q. When you first broached the question of going to Oregon on to Mr. Esfeld of the American Discount, he refused to finance your operation there, is that not correct?

A. Yes; yes, he declined to advance me this additional \$11,000 that I needed to purchase some more equipment I wanted and suggested that I get some money in Portland, which I did.

Q. Did I understand you to say that you had told him before that time, and when he originally financed you, that you were going into Oregon?

A. Yes. You see, most every business transaction I had with the office down there at the Smith Tower had to have the approval of Mr. Pete Thomas, this associate of the company.

(Testimony of J. W. Van Meter.)

Q. I am talking now about Mr. Esfeld.

A. I know you are. Mr. Esfeld and Mr. Thomas and myself had had a number of conversations about locations where I might log. [76]

Q. Just to get this straight: Do I understand you to claim that before the American Discount Company financed this equipment at all, that you told them you were intending to go to Oregon?

A. Yes; that should be your understanding.

Q. You did tell them?

A. Yes; they knew I intended to go to Oregon the next year.

Q. But when you came to them and asked them to finance the undertaking they then asked you to take your business and refinance somewhere else?

A. They wouldn't have asked me to take my business elsewhere except that I wanted to borrow \$11,000 and they didn't want to stick that much money in the equipment when I was going to take my business down to Oregon. There was no ill-will there. I was moving quite a ways away and didn't expect to come back.

Q. That was the first time that they had any definite knowledge that you were up to the point of intending to go to Oregon?

A. Well, now, that would be up to them to interpret what their understanding was.

Q. That was the first time that you yourself had come to any definite conclusion to go to Oregon?

A. I might say that that is the time when I decided to go.

(Testimony of J. W. Van Meter.)

Q. Up to that time all of your operations had been within [77] the State of Washington?

A. I came from Oregon, you understand, before I was ever logging in Washington. I was in the truck business for years in Oregon and moved up here in '39 and two or three years later became acquainted with this company and they did a part of my financing.

Q. All of your financing that they had done up to that point had had to do with operations in Washington? A. Yes.

Q. Then actually, prior to the time that you moved your equipment to Oregon, the American Discount Company had been paid off in full and Granning & Treece had taken over all of the financing, is that correct? A. Yes.

Q. So that before you moved to Oregon, the American Discount Company was entirely out of your financing?

A. They received——

Mr. Olsen: If your Honor please, he has definitely testified that he moved a few days before. I don't think it is necessary to go over that ground.

Q. (By Mr. Clarke) You did not refinance again when you moved to California?

A. No.

Q. Your financing was still held by Granning & Treece? [78]

A. That is right.

Q. When you moved to California, you didn't

(Testimony of J. W. Van Meter.)

notify the American Discount Company or Lipman & Esfeld anything about that move?

A. I didn't feel that I was obligated to notify them.

The Court: What is that? I didn't hear.

A. I didn't feel that I was obligated to notify them of where or when I moved. I did, however, notify the present finance company, Granning & Treece, and supposed that everything was in order. I wasn't thinking with a view to insurance.

Q. You knew that Granning & Treece at that time had possession of your insurance policy?

A. I don't know about that. A fellow would suppose that they would have everything in the way of papers relating to the equipment—having a mortgage on it, you know.

Q. Do you remember signing an authorization whereby you authorized the American Discount Company to send all papers, including insurance policies, down to Granning & Treece?

A. I believe I signed that in Mr. Treece's office.

Q. And that was prior to your refinancing with Granning & Treece or was a part of your refinancing?

A. Yes, sir. It was a part of the deal.

Mr. Clarke: I have no further questions. [79]

Mr. Olsen: I have no further questions.

The Court: Maybe I asked you this before. If I did, I don't quite understand it.

The Witness: O. K.

(Testimony of J. W. Van Meter.)

The Court: Before or at the time you told these agents that you wanted this insurance, did you tell them that you were going out of the State of Washington?

The Witness: Yes.

The Court: When was that—before or at the time; when was it?

The Witness: That was before the fire—I mean before I bought this TD-18 tractor, prior to that. I would come in town at maybe two or three months' intervals from wherever I happened to be logging in the State of Washington to see them or other business. I would stop in and see Mr. Thomas or Mr. Esfeld quite frequently. I had several conversations—not a lot of them—but anyway two or three that I expected to leave the State. You see, I had logged all over the State of Washington and contract jobs were hard to get.

The Court: That was with Lipman & Esfeld?

The Witness: Yes.

The Court: We will take a few minutes' recess, [80] gentlemen.

(Witness excused.)

(Recess.)

Mr. Olsen: I would like to call Mr. Mullins.

JOHN R. MULLINS

a witness called on behalf of the Plaintiffs, having been duly sworn testified as follows:

Direct Examination

By Mr. Olsen:

Q. Will you please state your name.

A. John Mullins.

Q. Where do you live?

A. Portland, Oregon.

Q. I will ask you by whom were you employed during the month of April, 1945?

A. Granning & Treece.

Q. In what capacity?

A. Office Manager.

Q. What is the business of Granning & Treece?

A. Financing of automobiles, automotive equipment.

Q. I will ask you whether or not it was your duty or some of your duties to examine papers when they came in on a loan being closed? [81]

A. Yes, it was.

Q. Do you recall the time Granning & Treece made a loan to J. W. Van Meter? A. I do.

Q. Do you recall receiving or having turned over to you for checking a Franklin Fire Insurance policy, Plaintiffs' Exhibit 1, No. 8629, do you recall having received that in the mail?

A. I received the complete file for checking. If this policy was in effect at that time it was a part of the file.

Q. Did you examine that policy? A. Yes.

Q. I will ask you whether or not you noticed the provision there relative to coverage being limited to the State of Washington? A. No.

Mr. Clarke: I object to the question of whether or not he noticed it because in examining he is bound in law to notice it.

The Court: Overruled. You may answer the question. Did you notice it?

The Witness: No, I did not. I don't recall that. [82]

Q. (By Mr. Olsen) Did you notice the form of the policy? A. Yes.

Q. Were you familiar with the general form?

A. Yes.

Q. You identified it by inspection as what they called an Inland Marine policy?

A. I don't know as I paid much attention to that phase.

Q. I call your attention to the condition on the reverse side of the policy and ask if you noted that provision 1, "Territorial Limits"?

A. I believe I did because most policies carry their provisions in printed form. We usually scan those.

Q. This provision 1 reads, "Territorial Limits. This policy covers only within the limits of the United States and Canada." Did the presence of that provision in the policy cause you possibly to overlook checking the other provisions of the policy?

Mr. Clarke: Objected to as leading.

The Court: Sustained.

(Testimony of John R. Mullins.)

Q. (By Mr. Olsen) After you examined the policy, what did you notice with reference to the payee of the policy?

A. I noted that my firm was not protected in the case of loss. [83]

(Letter marked Plaintiffs' Exhibit 16 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs' Exhibit 16 and ask you to state what that is.

A. That is a letter to Lipman & Esfeld requesting a loss payable endorsement or rider form to the policy in favor of Granning & Treece.

Q. What is that slip attached to that letter?

A. That is a memorandum requesting the same form in the case of the Franklin Fire Insurance policy.

Q. Are those pencil markings yours?

A. No, they are not.

Q. Do you identify them as being any particular person's pencil marks? A. No.

Mr. Olsen: I offer this in evidence.

Mr. Clarke: We have the same objection that it is immaterial and irrelevant to the points at issue.

Mr. Olsen: I offer Plaintiffs' Exhibit 16 in evidence.

The Court: Overruled. It may be received.

(Plaintiffs' Exhibit 16 received in evidence.)

[Plaintiffs' Exhibit 16 set out on pages 58-59.]

Q. (By Mr. Olsen) Have you made inquiry as

(Testimony of John R. Mullins.)

to whether or not Granning & Treece have a copy of any reply received [84] at about that time from Lipman & Esfeld; have you made inquiry to ascertain whether they had the original of a reply received from Lipman & Esfeld referred to in that?

A. That was a conversation over the telephone.

Q. What was their reply?

A. That they had no such letter.

(Letter marked as Plaintiffs' Exhibit 17 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiffs' Exhibit 17 and ask that you look that over and say whether or not that is a correct copy of a letter received by your office at or about the date that it purports to have been sent?

A. I would say it was because I particularly recall parts of it.

Q. I might ask you: What was there about this loan that caused you to remember it rather distinctly?

A. The rather unusual amount involved; considerably more than the average run of loans.

Mr. Olsen: I offer Plaintiffs' Exhibit 17 in evidence.

Mr. Clarke: The same objection as to the previous exhibit.

The Court: The same ruling.

(Plaintiffs' Exhibit 17 received in evidence.)

[Plaintiffs' Exhibit 17 set out on pages 59-60.]

(Testimony of John R. Mullins.)

(Letter marked as Plaintiffs' Exhibit 18 for identification.)

Q. (By Mr. Olsen) I hand you Plaintiff's Exhibit Number 18, and ask you what that is.

A. That is an acknowledgment of receipt of the loss payable endorsement for the two policies.

Mr. Olsen: I offer that in evidence.

Mr. Clarke: I make the same objection.

The Court: The same ruling.

(Plaintiffs' Exhibit 18 received in evidence.)

[Plaintiffs' Exhibit 18 set out on page 61.]

Q. (By Mr. Olsen) In Plaintiffs' Exhibit 18, you refer, in reply to their request, that you will have to write to Mr. Van Meter for approval of an advance, do you not? I will ask you whether or not you or any company made that advance?

A. No, I do not.

Q. After you checked the insurance policy circumstances, what did you do with them?

A. They were placed in the collateral file along with the mortgage.

Mr. Olsen: That is all. [86]

Cross Examination

By Mr. Clarke:

Q. Did you have any part in the personal negotiations with Mr. Van Meter concerning the placing of this loan? A. No.

Q. Your duties then were confined to examina-

(Testimony of John R. Mullins.)

tion of the various documents that came down from the American Discount Company?

A. Yes, that is correct.

Q. You have stated that among other things you examined this Franklin Fire Insurance policy?

A. I examined all papers in the file, yes.

Q. Including this policy? A. Yes.

Q. The purpose of your examination was to determine whether or not the coverage was proper?

A. Yes.

Q. It is your business to examine numerous of these kinds of policies in this type of coverage?

A. Well, that is true.

Q. When you read these policies, do you check to see that the descriptions of the property there are the same as listed in your mortgages?

A. Yes, I do. [87]

Q. Do you remember whether or not you did that in connection with this particular policy?

A. I feel that I did. It is customary.

Q. Then calling your attention to the form attached to the policy "Inland Marine Department" where it says "Inland Marine Department Contractors Equipment Floater Insurance," I will ask you whether the equipment is not listed by model number in typewriting under "2" thereof?

A. Yes.

Q. Immediately following that in Item Number 3, you see the clause "This insurance covers only within the limits of the State of" blank and "Washington" in there in typewriting also? A. Yes.

(Testimony of John R. Mullins.)

Q. That is immediately below this equipment and so forth that you were checking? A. Yes.

Q. You wish to state that you made no notice of that provision in the policy?

A. I just can't recall it. It could have been a slip, you know, on my part.

Q. Did you say you read all of these printed conditions on the back?

A. Well, now, I wouldn't say that I read them all. But [88] we usually scan over the provisions of a policy.

Q. Don't you consider it more important to read the typewritten provisions than you do the printed provisions?

A. My chief concern there was in the rider protecting us.

Q. That is whether or not your name was on there as loss payee? A. Yes.

Q. But it was your further duty to see that it covered the proper property and was in the proper place, was it not? A. Yes.

Q. You customarily on all types of business that you finance hold the insurance policy in your possession as mortgagee, don't you? A. Yes.

Mr. Clarke: There is in the file a deposition of Sol Esfeld that has a letter in it that I would like to refer to.

(Letter marked as Defendant's Exhibit A-2 for identification.)

(Testimony of John R. Mullins.)

Q. (By Mr. Clarke) You are acquainted, are you not, with Mr. Treece's signature?

A. Yes.

Q. I hand you Defendant's Exhibit A-2 and ask you whether [89] or not you recognize that as a letter written by your office?

A. I would say that it was because it is on their letterhead that that is Mr. Treece's signature.

Q. What is the attachment thereto?

A. That is an authorization for pay-off, including a description.

Q. That is customarily taken by your firm when they finance property?

A. Yes; that is their authorization.

Q. I will ask you whether or not that is Mr. Van Meter's signature?

A. I can't say for sure.

Q. That is the authorization to the American Discount Company to send all papers down to you?

A. Yes.

Mr. Clarke: Have you seen this?

Mr. Olsen: Yes.

Mr. Clarke: We offer this in evidence at this time.

Mr. Olsen: No objection.

The Court: It may be received.

(Defendant's Exhibit A-2 received in evidence.)

[Defendant's Exhibit A-2 set out on pages 62 to 64.]

Mr. Clarke: No further examination at this [90] time.

Mr. Olsen: That is all.

(Witness excused.)

The Court: We will now take a recess until tomorrow morning at 10:00 o'clock.

(At 4:00 p.m., Monday, September 16, 1946, Court recessed until the following day at 10:00 a.m., Tuesday, September 17, 1946, in the United States Court House.) [91]

Seattle, Washington, September 17, 1946, 10:00 a.m.

(All parties present as before.)

The Court: You may call your next witness.

Mr. Olsen: Mr. Cooper.

FRANK COOPER

a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olsen:

Q. Will you please state your name?

A. Frank Cooper.

Q. What is your business connection, Mr. Cooper?

A. Branch Manager of the Howard Cooper Corporation, Seattle.

(Testimony of Frank Cooper.)

Q. What is their business?

A. Construction equipment and logging equipment.

Q. Any particular line of equipment—that is, speaking of manufacturing?

A. International Harvester, J. D. Adams. [92]

Q. How long in that business?

A. Well, it could have been in business for about thirty years.

Q. How long have you been in business?

A. About ten years.

Q. In that capacity you bought and sold International Harvester tractors, have you?

A. That is correct.

Q. Of the heavy type? A. Yes, sir.

Q. You are conversant with their values, are you? A. Yes, sir.

Q. I hand you Plaintiffs' Exhibit 1 and ask you to note the description of that International Harvester tractor therein and ask you: Are you familiar with that model and style and size?

A. Yes, sir.

Q. What year model is that?

A. About a 1943, as near as the serial number indicates.

Q. Assuming a tractor of that description is in good working condition and has recently been overhauled at an expense of approximately \$600, and to all intents and purposes is in good working condition, what would be your opinion as to its value on or about the first of October, 1945? [93]

(Testimony of Frank Cooper.)

Mr. Clarke: Objected to on the ground that this witness has not seen the particular piece of equipment. It was a used piece of equipment, and any testimony that he could give in that regard without having seen it would not have much probative value.

The Court: Can you answer the question?

The Witness: Your Honor, as a general rule tractors in the past few years have been selling at certain prices under the OPA regulations and any tractor that has been in good condition, they have been getting 85 per cent of the value of the tractor without question.

Q. (By Mr. Olsen) You say 85 per cent of the value; you mean 85 per cent of the new price?

A. That is right.

The Court: Wait just a minute. Do I understand you to say they are just lumped together in one category or class?

The Witness: Yes.

The Court: Regardless of the individual condition of them. is that right?

The Witness: If the seller will put a warranty on the tractor of its being in good condition they are allowed to charge by the OPA eighty-five per [94] cent of the new price. That is what they have been doing and in some cases more than that. They are then in violation of the OPA rules.

The Court: Overruled. You may answer.

Q. (By Mr. Olsen) What is your opinion as to the value of the tractor then—this tractor on or about October 1, 1945, having in mind, first, that it is a used tractor in good condition?

(Testimony of Frank Cooper.)

A. The new sales price was \$10,500.00—roughly it would be 85 per cent of that.

Q. 85 per cent of \$10,500.00?

A. Yes. [95]

Mr. Olsen: I would like to call Morton Pinch as an adverse witness.

MORTON PINCH

called as an adverse witness by and on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olsen:

Q. Please state your name.

A. Morton Pinch.

Q. What is your business connection?

A. Insurance agent, partner with Lipman & Esfeld.

Q. How long have you been in the insurance business?

A. Since 1924, other than about a year's time.

Q. Do you recall issuing this policy TR-8629 of the Franklin Fire Insurance Company of Philadelphia, Plaintiffs' Exhibit 1? [100]

A. We did not issue the policy. The policy was ordered from the branch office of the Franklin Fire Insurance Company.

Q. Do you recall signing it?

A. Not specifically, no.

(Testimony of Morton Pinch.)

Q. Those are your signatures, are they?

A. Yes.

Q. Have you issued this policy upon a number of occasions?

A. The Franklin Fire Insurance Company have issued it for our office.

Q. You have signed it for them upon a number of occasions?

A. I have signed it for them.

Q. Are you familiar with the printed provisions of it?

A. Most of the printed provisions I am familiar with.

Q. I will ask you when you signed this policy were you aware of the provisions in the endorsement to the effect that coverage is limited to the State of Washington?

A. I don't think at the time that I paid much attention to that.

Q. You were not aware of it?

A. At least it was not directed to my attention.

Q. You signed it?

A. I signed it, yes.

Q. I hand you Plaintiffs' Exhibit 16, and ask if you recall having received that letter from Graning & [101] Treece,—or did you receive it, I mean?

A. Yes.

Q. And the little attachment there, you received that, did you?

A. I am not sure just when we received the attachment. It was attached to this letter and we

(Testimony of Morton Pinch.)

turned the file over. I don't know if it came with the letter, or how soon afterwards. It was a part of the file. There is no date on the memorandum we received.

Q. Whose handwriting is on that?

A. The word "balance" is mine and the other words are Mr. Goldman's.

Q. Did your office receive that letter, Plaintiffs' Exhibit 4? A. It appears to be.

Q. You say it did.

A. It was addressed to us. I guess we received it.

Q. You received it—it was in your files?

A. Yes.

Q. I hand you Plaintiffs' Exhibit 17, being copy of a letter dated May 18, 1945, to Granning & Treece; I ask you whether or not that is a correct copy of a letter you sent to that office?

A. Yes.

Q. I hand you Plaintiffs' Exhibit 15, which purports to [102] be a letter dated May 18, 19—I believe your date is wrong—it is 1946, but it should be 1945,—would the correct date of that letter be May 18, 1945? A. Yes.

Q. Is that a correct copy of the letter that you wrote to Mr. Van Meter on that date?

A. It appears to be.

Q. The copy that is attached, is that a correct copy of a letter that you wrote to Granning & Treece? A. It appears to be.

Q. In the third paragraph of that letter you re-

(Testimony of Morton Pinch.)

ferred to "contractors' equipment policy on International Tractor"? A. Yes.

Q. And that is the policy that is involved in this action, is it? A. Yes.

Q. Handing you Plaintiffs' Exhibit 5, I ask you if that is a letter you wrote to Mr. Van Meter at Wallowa County, Oregon, on May 14, 1945?

A. Yes.

Q. I hand you Plaintiffs' Exhibit 14 and ask you if that is a copy of a letter addressed to Graning & Treece which you sent to Mr. Van Meter on the date of that letter? [103]

A. Yes.

Q. I will ask you whether you considered this policy in force all during that period?

Mr. Clarke: Objected to as to what the consideration or conclusion of this witness is as immaterial.

The Court: Sustained.

Q. (By Mr. Olsen) I will ask you whether it was your understanding that the policy was in force?

Mr. Clarke: The same objection.

The Court: The same ruling. There is no denial on the part of the defendant that it was in force, is there?

Mr. Clarke: As written.

Q. (By Mr. Olsen) Did you at any time prior to the occurrence of this fire know the presence of this provision in the policy limiting it to the State of Washington?

(Testimony of Morton Pinch.)

Mr. Clarke: Objected to as immaterial.

The Court: Overruled. You may answer.

A. I was not aware of it.

Q. (By Mr. Olsen) You were familiar with the printed provisions [104] of the policy, were you not, the printed provisions?

A. Most of them.

Q. As far as you knew, there was nothing in the policy which would affect its validity during this period?

Mr. Clarke: Objected to upon the ground that as to what his knowledge or thoughts may have been with reference to this particular policy, or whether it was or was not valid at any time are utterly immaterial.

Mr. Olsen: If Your Honor please, he is the authorized agent of the insurance company, and he is the one who issued this policy, and he is the one who is authorized to act. If he did not consider the insurance in effect or had any knowledge that it was not in effect, it seems to me it might be material.

The Court: The defendant does not deny it being in effect, as written of course, so I don't think there is any question about that. Sustained.

Q. (By Mr. Olsen) In your various correspondence with Granning & Treece and J. W. Van Meter, were you trying to explain that the policy was in effect?

Mr. Clarke: Objected to upon the ground that the correspondence is the best evidence and speaks for [105] itself.

(Testimony of Morton Pinch.)

The Court: Sustained.

Mr. Olsen: I think that is all.

Cross Examination

By Mr. Clarke:

Q. Mr. Pinch, did you have any conversation with Mr. Van Meter or with anyone prior to the issuance of this policy concerning what was to be contained therein? A. No.

Q. Where you are issuing a policy of this type, where is the decision made as to the territorial limitations?

Mr. Olsen: I object to that, Your Honor. This party is an agent and it is not material as to who decides that fact—whether or not it is the office boy or the president. The fact is that the company is responsible for the acts of its agents, and it is immaterial as to who makes the decision.

The Court: You are asking about the custom.

Mr. Clarke: Yes, Your Honor.

The Court: I doubt that. Sustained.

You might ask him about this particular policy if you want to.

Q. (By Mr. Clarke) Mr. Pinch, relate to the best of your [106] recollection the circumstances concerning the issuance of this policy in so far as they are within your own personal knowledge.

A. Well, actually I don't recall the ordering of the coverage but it was the practice at that time, under these conditions for Mr. Esfeld of the American Discount Company to order the coverage from

(Testimony of Morton Pinch.)

an employee of our department or our agency; and the employee in turn would order the coverage from the branch office of the Franklin Fire Insurance Company—since as I stated we do not issue that type of policy in our office. There are always certain things about it that have to be embodied, and it is up to the company to actually pass upon it. So our employee, in turn, as I say must have ordered the policy from the Franklin Fire Insurance Company who in turn would mail us the policy. The policy ordinarily is scanned over or checked by the person that ordered the coverage. In this instance, in view of the fact that the American Discount Company had a loss payee interest in the policy, after I signed—countersigned the policy as an agent for the Franklin Fire Insurance Company, they would then check the policy to determine if there was anything left out that should have been in the policy.

Actually in the case I didn't have anything to [107] go by. It was ordered. The Franklin Fire Insurance Company has a memorandum as to the order having come from their office and they issued a policy accordingly. It was incumbent upon me, I suppose, to check and see if the policy was written properly. To my best knowledge at the time it was. I didn't notice anything unusual about the policy or the contract.

We then would have turned, as I say, the policy over to the American Discount Company. The bill

(Testimony of Morton Pinch.)

in this case for the premium was not charged to the American Discount Company as sometimes we do if arrangements are so made. But instead, as a matter of practice, it should have been and I imagine it was, mailed out to Mr. Van Meter. And along with it should have gone a copy of the policy, because we generally get a couple of extra copies from the Franklin Fire Insurance Company, the issuing company on this type of contract and there would be no reason for us to retain extra copies in our office when the assured—the insured—did not have—wouldn't be getting the original policy. As a matter of course I can't recall all of these things. As a matter of form a form letter goes out——

Mr. Olsen: I think possibly the answer is not [108] responsive to the question; it is going a little bit beyond the question.

Mr. Clarke: I think I have nothing further.

Mr. Olsen: I want to ask the witness a few more questions on direct examination if I may, your Honor.

Further Direct Examination

By Mr. Olsen:

Q. In your letter of May 18, Plaintiff's Exhibit 15, you refer to a balance of \$204 and some cents owing on the insurance account. A. Yes.

Q. And you explain, I believe that approximately \$138.61 of that represents a balance on this Franklin Fire Insurance policy. A. Yes.

Q. Was that sum later paid? A. Yes.

Q. About what date?

(Testimony of Morton Pinch.)

A. Well, our records show that we received it in June—the first part of June—from the American Discount Company. It seems that we continued to write—as it is now developed we continued to write Mr. Van Meter for the balance after it was paid to the American Discount [109] by Granning & Treece.

Q. Have you found out that this \$138.00 was collected by the American Discount Company at the time their loan was paid off?

A. I have since found it out.

Q. And that is the fact, is it?

A. It appears to be.

Q. And they later turned that \$138.00 over to you?

A. That is right.

Mr. Olsen: That is all.

Mr. Clarke: No further questions.

The Court: Mr. Pinch, as I understand you to say, you did not talk to the plaintiff, Van Meter, about the issuing of this insurance policy?

The Witness: I think I can safely say that, your Honor, I don't recall having talked to Mr. Van Meter about the issuance of the policy.

The Court: Do you know of his talking to anyone that you know of?

The Witness: In our office, Mr. Van Meter has testified he talked to Mr. Esfeld about issuing the policy.

Let me state this: We took over the agency in April, 1944.

The Court: That is Lipman & Esfeld. [110]

(Testimony of Morton Pinch.)

The Witness: Lipman & Esfeld. Mr. Esfeld was the sole owner of the agency prior to that time or at that time. He had run the business practically exclusively, I mean dominantly. He was the head of the business and ran the business. So he was familiar with the insurance coverages and conditions. I was out of the office for about a year prior to April '44, and then I came back to the office and more or less stepped into his shoes.

Mr. Van Meter, as I say, had testified he ordered the coverage from Mr. Esfeld after discussion as to what he wanted and what was best for him. Mr. Esfeld, in turn—I think his deposition states that he turned over the information to one of our employees in good faith, naturally, and thought that he was taking care of it exactly as I would have taken care of it had the coverage been ordered from me direct.

The Court: Did you know Mr. Van Meter at the time you signed the policy?

The Witness: I knew him, I think, by sight at about that time. I don't recall having talked to him very much before that time.

The Court: Did you or did you not know he was a logger?

The Witness: I knew he was a logger. [111]

The Court: Did you know that his business was accepting logging contracts up and down the Pacific Coast, both in and out of the State of Washington?

The Witness: I would qualify that by saying

(Testimony of Morton Pinch.)

that I would have to know that he accepted contracts for logging. But as to whether he would go beyond the State of Washington, I wouldn't know that. I can amplify that by saying that the American Discount, as it is indicated here, was not interested in financing and additional equipment for him when he took it out of the State. Their practice is generally to confine their loan to the State of Washington, so something of that nature wouldn't generally come up.

The Court: Is the firm of Lipman & Esfeld a corporation?

The Witness: A co-partnership.

The Court: Were you one of the partners on the day that you signed the policy.

The Witness: Yes.

The Court: Is the American Discount Company a corporation—was it on that day?

The Witness: At that time I think they were a co-partnership.

The Court: Were you interested in the American [112] Discount Company on the day on which you signed the policy?

The Witness: No.

The Court: You had no——

The Witness: No financial interest whatsoever.

The Court: Was any office holder on anyone interested in Lipman & Esfeld an officer in the American Discount Company?

(Testimony of Morton Pinch.)

The Witness: No. There was no inter-relationship between our company.

The Court: They were separate and distinct?

The Witness: That is right.

The Court: All right. Who else was interested in the Lipman & Esfeld Company on that date?

The Witness: My co-partner, Abe Goldman.

The Court: Goldman?

The Witness: Yes.

The Court: How did you happen to request the policy; who came to you—who asked you for it?

The Witness: As I say, to my best recollection or as a matter of practice at that time, Mr. Esfeld ordered it from one of our girls who handles that end of the business. She would have automatically ordered it from the Franklin Fire, because we give [113] them most of that class of insurance.

The Court: He was not then interested——

The Witness: No. As I say he would have handled it about the same as I would at that time.

The Court: How long have you lived in the State of Washington?

The Witness: Since 1905.

The Court: Have you ever taken any other application for logging insurance—I mean from logging contractors?

The Witness: Most of that stuff is in connection with the American Discount.

The Court: I mean have you ever issued policies for them?

The Witness: Yes.

(Testimony of Morton Pinch.)

The Court: What is their custom in this State? I know nothing of it. Logging to me is foreign.

The Witness: Well, it is kind of foreign to me, too.

The Court: What is the custom of these logging contractors in the State of Washington with reference to their place of work; do they go out of the State or do they stay in the State of Washington?

The Witness: Well, I am not expert on that [114] either but I think by and large they stay in the State. There certainly ought to be enough timber around here for logging for a period of time, at least for the length of the currency of the policy. There might be occasion to go down to Oregon, but for one year's period, the length of time of the policy—Mr. Van Meter has testified that they logged here and they most likely would confine themselves to one area.

The Court: These other policies that you have issued for loggers, do they state within the State?

The Witness: It is the practice to confine them within the State.

The Court: Who requested this policy?

The Witness: Mr. Esfeld requested it from one of our employees.

The Court: What employee?

The Witness: It would have been Miss Weiss in our office.

The Court: Where is Miss Weiss?

The Witness: She is still in our office.

(Testimony of Morton Pinch.)

The Court: When you issued the policy——

The Witness: Yes, we ordered the policy.

The Court: I mean when you signed it.

The Witness: Yes.

The Court: Did you know that Mr. Van Meter [115] wanted a policy that covered him out of the State of Washington?

The Witness: No.

The Court: Did you pay any attention to what kind of a policy you got him in that respect?

The Witness: I knew it was this form that would ordinarily be issued on that type of equipment; they call it a contractors' equipment form. It is a little broader than an automobile policy, if the company wants to write a policy on that type of equipment.

The Court: Does the Franklin Company issue policies of this kind on equipment that goes out of the State of Washington?

The Witness: I suppose they do.

The Court: Did you ever write such a policy?

The Witness: I don't recall that I ever did.

The Court: Did you ever see this limitation clause in any other contract issued by the Franklin Fire Insurance Company?

The Witness: No.

The Court: Did you ever see any without it?

The Witness: I couldn't say that I have—that I recollect.

The Court: That is all. [116]

Mr. Olsen: I wanted to ask just one question.

(Testimony of Morton Pinch.)

Redirect Examination

By Mr. Olsen:

Q. You said Mr. Esfeld had no interest in Lipman & Esfeld. It is a fact, is it not, that you entered into a contract to purchase the business from Mr. Esfeld sometime in April, 1944?

A. Yes.

Q. And that there was a substantial balance owing to him under that contract? A. Yes.

Q. As of the time that this policy was issued in November, 1944? A. That is correct.

Q. Likewise as of the time of this change in April, 1945?

A. Well, the balance was much less at that time.

Q. So he had an interest in it in that respect?

A. He had an unpaid balance. He had no interest in the sense that he had anything to do with the operation of the company.

Q. The Franklin Fire Insurance Company knows that you are carrying on your business under the name of the Lipman & Esfeld, do they not?

A. Yes, they do. [117]

Mr. Olsen: That is all.

Recross Examination

By Mr. Clarke:

Q. This balance is just a flat balance, is it not?

A. Yes.

Q. What I mean by that: Is it in any way

(Testimony of Morton Pinch.)

contingent or payable out of the profits of the agency?

A. No; it is just a straight contract.

Q. You owe the same amount regardless of how much the agency may or may not make?

A. That is correct.

Mr. Clarke: That is all.

Redirect Examination

By Mr. Olsen:

Q. What did you and Mr. Goldman pay Mr. Esfeld for that business?

Mr. Clarke: I don't believe that is material. I object to it.

Mr. Olsen: The price may have been contingent somewhat upon the future business.

The Court: Oh, I don't think that is material.

Mr. Olsen: That is all.

(Witness excused.) [118]

Mr. Olsen: That is the Plaintiffs' case.

(Recess.)

Mr. Clarke: Comes now the defendant Franklin Fire Insurance Company, and without waiving its right to introduce further evidence, moves that plaintiffs' complaint be dismissed upon the ground that there is no evidence introduced by plaintiffs which shows a right of recovery against the defendant and that it affirmatively appears from the

(Testimony of Morton Pinch.)

evidence as introduced today that there is no right of recovery against the defendant insurance company.

I would like to argue that matter somewhat at length at the present time, if your Honor please, because it seems to me that the essential elements of the case are in and that the evidence that might be introduced from now on would not have any great bearing upon the situation.

I think the legal premises which I am prepared to argue apply to the situation as it now exists.

(Mr. Clarke presents argument to the Court.)

(Mr. Olsen presents arugment to the Court.)

(Mr. Clarke present closing argument to the Court.) [119]

(At 12:10 p.m., Tuesday, September 17, 1946, proceedings recessed to 2:00 p.m., on the same day in the United States Court House.)

Seattle, Washington

September 17, 1946, 2:00 p.m.

(All parties present as before.)

The Court: Mr. Olsen, I am very sorry to have to tell you that in view of that Ninth Circuit decision, I see nothing for this court to do except to grant the motion. In that case the mortgagee bank, who was the agent, knew and had known

for years that this house was not used for residential purposes; knew it at the time the policy was issued and knew it for years. I am satisfied that the Ninth Circuit would not let a judgment stand in this case, in view of that [120] case. I am very sorry indeed.

The defendant's motion is granted.

Concluded. [121]

CERTIFICATE

I, Merritt G. Dyer, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ MERRITT G. DYER,
Official Court Reporter.

[Endorsed]: No. 11535, United States Circuit Court of Appeals for the Ninth Circuit. J. W. Van Meter, B. B. Granning and J. D. M. Treece, Appellants, vs. Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed February 3, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth District

No. 11535-L

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Plaintiffs,
Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY
OF PHILADELPHIA, PENNSYLVANIA,
a corporation, MORTON PINCH and ABE
GOLDMAN, co-partners, d/b/a LIPMAN &
ESFELD,

Defendants,
Appellees.

STATEMENT OF POINTS
TO BE RELIED UPON

The points upon which appellants intend to rely
on this appeal are as follows:

I.

The Court erred in denying plaintiffs' request for
jury trial and striking plaintiffs' demand for jury
trial.

II.

The Court erred in finding that the plaintiffs
were not entitled to a reformation of the policy as
prayed for in the Complaint.

III.

The Court erred in finding that the plaintiffs' were not entitled to recover on the theory that defendant, through its agents, had waived or was estopped to rely on that provision in the policy purporting to limit coverage to the State of Washington.

IV.

The Court erred in concluding that the decisions of the Ninth Circuit Court of Appeals in the case of *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2nd 333, 108 Fed. 2nd 713 were decisive of the issues in this case.

V.

The Court erred in dismissing the case at the close of the plaintiffs' case on defendants' motion challenging the sufficiency of the evidence.

VI.

The Court erred in denying appellants motion for a new trial.

JONES & BRONSON,
Attorneys for Appellants.

Received Feb. 6, 1947. Clarke, Clarke & Albertson; by D. Fry.

[Endorsed]: Filed Feb. 10, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD TO BE PRINTED

Appellants, pursuant to Sub-division 6 of Rule 19, hereby designates that the entire record including the transcript of proceedings at trial transmitted to the Clerk of the Circuit Court of Appeals for the Ninth District be printed with the following exceptions:

1. Omit that part of J. W. Van Meter's testimony commencing with line 19 on page 25 and ending with line 7, page 50 of the transcript of proceedings at trial and in lieu thereof insert the narrative of this part of J. W. Van Meter's testimony attached to the designation of record filed with the Clerk of the District Court appearing at pages 59 and 60 of the record.

2. Omit that part of Howard Cooper's testimony commencing with line 14, page 95 and ending with line 6, page 100 of the transcript of proceedings at trial.

JONES & BRONSON,
Attorneys for Appellants.

Received Feb. 6, 1947. Clarke, Clarke & Albertson, by D. Fry.

[Endorsed]: Filed Feb. 10, 1947.



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
For the Ninth Circuit

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Appellants,

VS.

FRANKLIN FIRE INSURANCE COMPANY of
Philadelphia, Pennsylvania, a corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

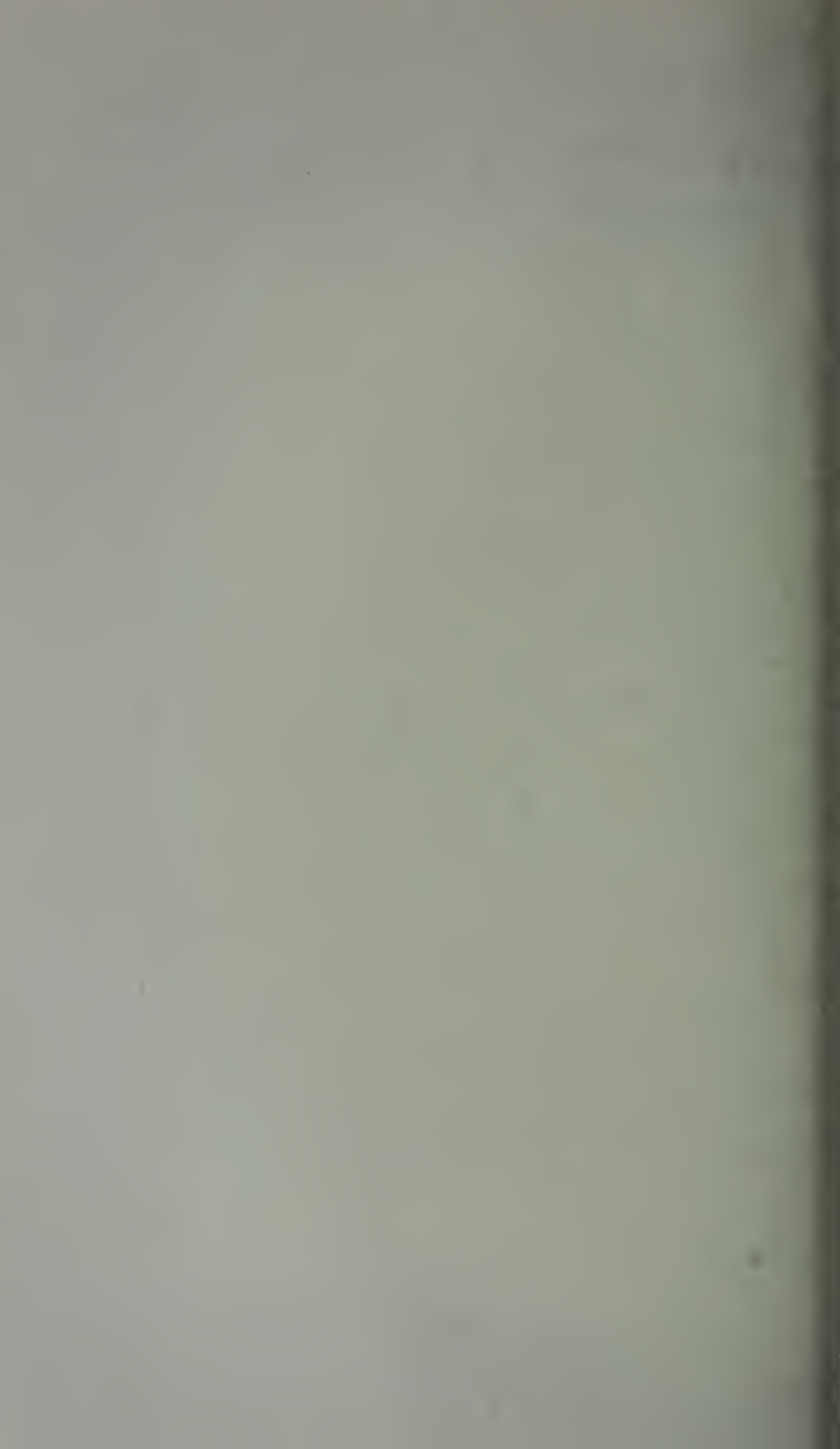
APPELLANT'S OPENING BRIEF

JONES & BRONSON,
ALBERT OLSEN

Attorneys for Appellant

610 Colman Building
Seattle, Washington.

FILED
APR 30 1947



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J. W. VAN METER, B. B. GRANNING and
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ALBERT OLSEN

Attorneys for Appellant

610 Colman Building
Seattle, Washington.

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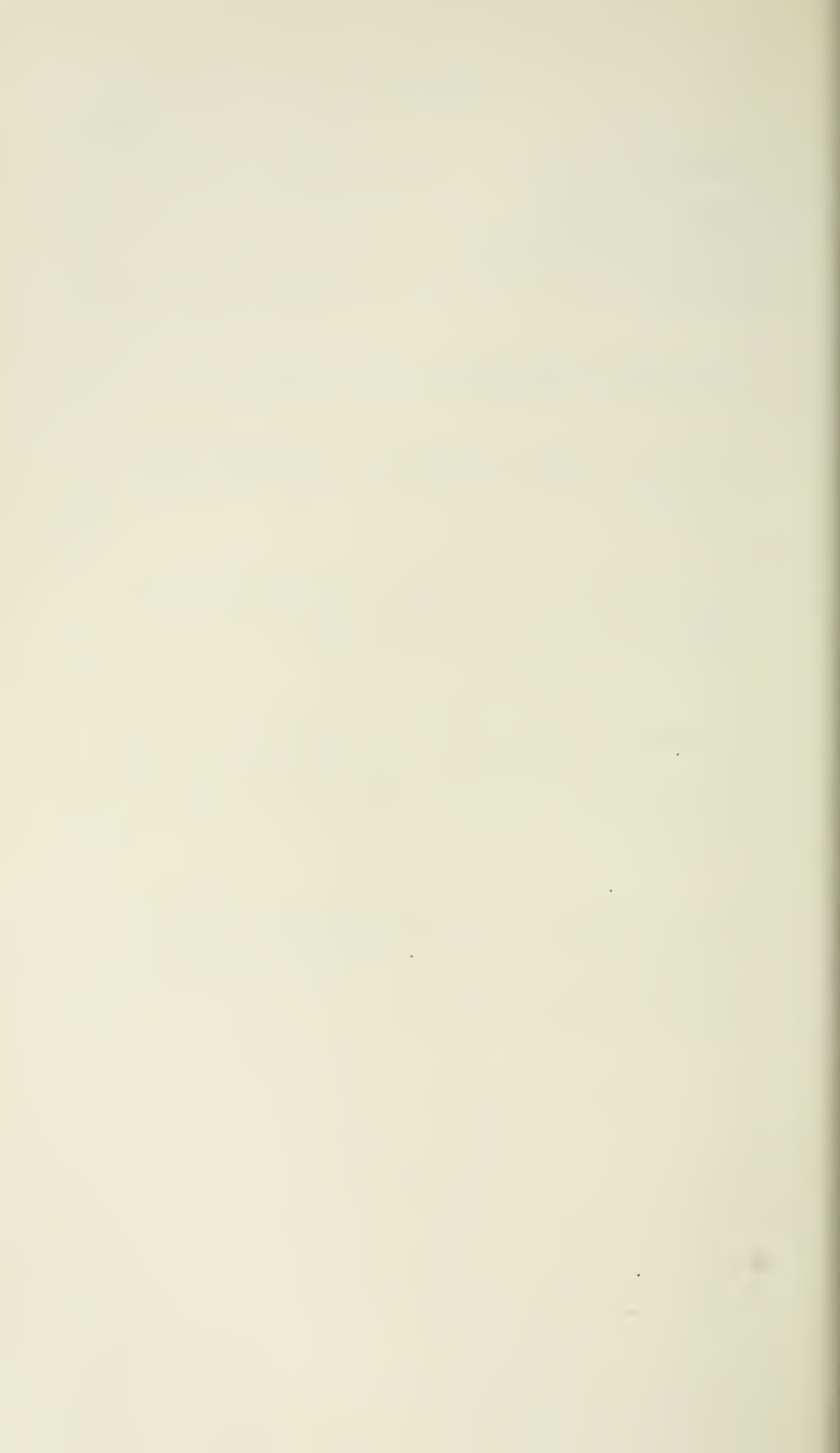


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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY of
Philadelphia, Pennsylvania, a corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

APPELLANT'S OPENING BRIEF

JURISDICTION

This action was initially brought by appellants, residents of Washington and Oregon, against Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation organized under the laws of the State of Pennsylvania, and Abe Goldman

and Morton Pinch, residents of Washington, in the Superior Court for the State of Washington in King County. (Tr. 2-10). Appellee insurance company filed a petition for removal (Tr. 24-31) and by order (Tr. 32-33) of said Superior Court, the action was removed to the United States District Court for the Western District of Washington. Removal was petitioned for and granted on the grounds that Abe Goldman and Morton Pinch were not necessary or proper parties and that the action was a separable controversy between residents of different states and that the amount in controversy exceeded the sum of \$3,000.00. (Tr. 24-33). Defendants, Abe Goldman and Morton Pinch, were later dismissed upon motion. (Tr. 43-44). The United States District Court has jurisdiction under Sections 41(1) and 71 of Title 28 USCA. This appeal is taken under Section 128(a) of the United States Judicial Code, (28 USCA 225 (a)) from judgment of dismissal (Tr. 45).

STATEMENT OF CASE

Appellants are bringing this action on a fire insurance policy issued by the appellee company. It is admitted that the policy (Tr. 10-23) attached to the complaint was issued and that the tractor covered thereby was damaged by fire on or about October 3, 1945, within the period covered by the policy. At the time the policy was issued, the equipment was located in the State of Washington. The fire occurred while the tractor was located in California.

The policy contained a provision purporting to insure the property only while located in Washington. Appellants seek first a reformation and recovery on the policy on the ground that the provision purporting to insure the property only while in the State of Washington was inserted contrary to the understanding and agreement of the appellant, Van Meter, and appellee's agent; secondly, recovery on the policy on the ground that the appellee had waived or was estopped to rely on this provision, and, with knowledge of the fact that the property had been moved out of the State, elected to treat the insurance as being in effect.

Appellants made timely demand for a jury trial (Tr. 41) but upon motion the demand was stricken and the case was tried before the Court without a jury. At the conclusion of the appellants' case, the appellee moved to dismiss on the ground that the evidence failed to show a right of recovery against the appellee. (Tr. 151). The Court granted the motion and entered judgment of dismissal. (Tr. 45).

The following are the salient facts either admitted by the pleadings or developed by the appellants' testimony.

The appellant, J. W. Van Meter, was on November 10, 1944, and for some time prior thereto engaged in the logging and trucking business. (Tr. 79). Lipman & Esfeld was a partnership, consisting at that time of Abe Goldman and Morton Pinch, engaged

in the insurance business and the American Discount Corporation was a loan company engaged in the business of lending money on securities. Both the firms, Lipman & Esfeld and American Discount Corporation, occupied the same office on the second floor of the Smith Tower Building, Seattle, Washington. (Tr. 80). For about five (5) years prior to the trial, appellant, J. W. Van Meter, had done business with these firms through Sol Esfeld, (Tr. 79-80), and generally when obtaining loans, the insurance was written by Lipman & Esfeld. (Tr. 81-82). Prior to April, 1944, Sol Esfeld had been the sole owner of Lipman & Esfeld (Tr. 145) and the appellant, J. W. Van Meter, had been issued policies by Lipman & Esfeld, signed by Sol Esfeld, (Tr. 80) but at no time prior to the loss in October, 1945, did he know of any change in the status of the ownership of Lipman & Esfeld. (Tr. 102).

Early in November, 1944, appellant, Van Meter, bought a tractor and logging arch and went to the office of the American Discount Corporation and Lipman & Esfeld to arrange to finance the purchase. (Tr. 81). At that time, he arranged with Sol Esfeld concerning insurance. Appellant, Van Meter, explained to Esfeld what risks he wanted covered (Tr. 82, 83, 115, 116), and Esfeld explained the different types of policies and reference was made to a marine policy that was good any place in any state, (Tr. 82-83) and it was this type of policy that Esfeld

agreed to have issued (Tr. 83, 116, 117). Sol Esfeld knew at that time that there was some likelihood that appellant, Van Meter, would move to Oregon. (Tr. 86, 118).

The testimony of Morton Pinch shows, that to the best of his recollection, Mr. Esfeld gave the data relative to this order for insurance to one of the employees of Lipman & Esfeld, and the policy, copy of which is attached to Complaint was thereafter issued, (Tr. 141-143), and turned over to the American Discount Corporation. The appellant, Van Meter, never actually saw the policy until after the fire in October, 1945. (Tr. 84, 103).

In March and April of 1945, appellant, Van Meter, again contacted Sol Esfeld at this office about financing a new truck, (Tr. 86-87), at which time he informed Mr. Esfeld that he had a logging job at Wallowa, Oregon. (Tr. 87). Esfeld was not willing to loan the additional money and suggested that Van Meter refinance in Oregon. (Tr. 87). At that time, Van Meter talked with Abe Goldman, one of the partners of Lipman & Esfeld, concerning his job in Oregon. (Tr. 89). Shortly thereafter, Van Meter arranged his financing with a Portland, Oregon firm and paid off his loan with the American Discount Corporation and moved his equipment to Oregon. (Tr. 87-88).

Defendant's Exhibit A-2 (Tr. 62-64) is a letter from Granning & Treece of Portland, Oregon, trans-

mitting a check to pay off the loan of the American Discount Corporation. Accompanying this letter was an authorization signed by appellant, J. W. Van Meter, directing the forwarding of the insurance policy and other papers to Granning & Treece stating: "If I am entitled to any refund for unearned interest or insurance premium, you may also return that direct to Granning & Treece." (Tr. 64).

Following this, there were various letters passing among Lipman & Esfeld and Granning & Treece and J. W. Van Meter which for purpose of clarity should be considered in the following order:

Plaintiffs' Exhibit 16 (Tr. 58, 59) is a letter dated May 4, 1945, from Granning & Treece to Lipman & Esfeld requesting a loss payable clause on Policy No. 906675 (not involved in this action). Attached to this letter is another slip of paper requesting loss payable clause on Policy No. TR8629 (being the one sued on here).

Plaintiffs' Exhibit 3 (Tr. 47-50) is a letter from Lipman & Esfeld to Van Meter dated May 1, 1945 (this date of May 1, 1945 is obviously in error because it appears to have been written after receipt of Exhibit 16), calling Van Meter's attention to the request for "loss payable endorsement" and requesting payment of a balance of \$204.86 as per statement enclosed.

Plaintiffs' Exhibit 4 (Tr. 50-51) is a letter dated May 14, 1945, written by appellant, Van Meter, to

Lipman & Esfeld from Wallowa, Oregon. In this letter, Van Meter refers to the expense of moving his equipment "over here."

Plaintiffs' Exhibit 15 (Tr. 55-57) is a letter dated May 18, 1945, from Lipman & Esfeld to Van Meter explaining how the balance of \$204.86 claimed to be owing was arrived at. Accompanying this letter was a copy of a letter by Lipman & Esfeld to Granning & Treece in which reference is made to loss payable clauses being forwarded. (Exhibit 17).

Plaintiffs Exhibit 18 (Tr. 61) is a letter from Granning & Treece to Lipman & Esfeld dated May 19, 1945, acknowledging receipt of Lipman & Esfeld's letter of May 18, 1945, with loss payable clauses.

Plaintiffs' Exhibit 5 (Tr. 51-53) is a letter from Lipman & Esfeld to Van Meter dated August 17, 1945, in which the subject of insurance is discussed at some length.

Plaintiffs' Exhibit 13 (Tr. 53) is a telegram and Plaintiffs' Exhibit 14 (Tr. 54) is a letter written by Lipman & Esfeld concerning this insurance after the fire had occurred.

The fact that these letters were sent by the parties signing them and received by the parties to whom they were addressed, is established by the testimony of Van Meter, John Mullins and Morton Pinch.

In September of 1945, appellant, Van Meter,

moved down to Redding, California, and on the night of October 3, 1945, the tractor was seriously damaged by fire. (Tr. 95). The cost of repair, including Van Meter's own time and that of one of his employees, amounted to a total of \$4550.07. (Tr. 97-99).

The first issue is whether appellants were entitled to a jury trial. The second issue before the Court is whether the admissions in the pleadings and the evidence entitles the appellants to recover on any theory. Appellants contend: (1) That the facts entitle them to a reformation of the policy as prayed for in the Complaint and recover thereon, and (2) That the facts show that the appellee through its agents waived the provision purporting to grant coverage only while the property was located in Washington, that it is estopped to rely on it, and that it elected to continue the insurance in force with knowledge of the facts.

SPECIFICATION OF ERRORS

1. The Court erred in denying appellants' request for jury trial and striking appellants' demand for jury trial.

2. The Court erred in finding that the appellants were not entitled to a reformation of the policy as prayed for in the Complaint.

3. The Court erred in finding that the appellants were not entitled to recover on the theory that the appellee, through its agents, had waived or was

estopped to rely on that provision in the policy purporting to limit coverage to the State of Washington.

4. The Court erred in concluding that the decisions of the Ninth Circuit Court of Appeals in the case of *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2nd 333, 108 Fed. 2nd 713 were decisive of the issues in this case.

5. The Court erred in dismissing the case at the close of the plaintiffs' case on defendants' motion challenging the sufficiency of the evidence.

6. The Court erred in denying appellants' motion for a new trial.

ARGUMENT

1. Appellants Entitled to Jury Trial:

If this action was one primarily and exclusively for reformation of the policy and recovery thereon as reformed, admittedly the appellants would not be entitled to a jury trial. However, the Complaint in Paragraph VI and VII alleges facts showing a subsequent waiver of the provision in the policy limiting coverage while the property was in the State of Washington. Appellants' demand for jury trial was predicated on the theory that irrespective of whether they could prove facts entitling them to a reformation of the policy, nevertheless, the Complaint tendered an issue over whether the appellee had waived the clause in question or was estopped to rely on it. These issues were issues on which

appellants were entitled to a trial by jury and if found in favor of the appellants would entitle them to recover irrespective of their being able to prove facts entitling them to a reformation of the policy.

While the principle of waiver, as applied in insurance law, is founded somewhat on the doctrine of equitable estoppel, there is a distinction between waiver and estoppel. The doctrines of waiver and estoppel have long since become a part of the common law and as such, the issues with respect thereto, are triable by a jury. For a discussion of this subject, reference is made to the following authority:

Vance on Insurance, Hornbrook Series (2nd Ed.) Pages 451-458.

While the statement is not made particularly with reference to whether a party is entitled to a jury trial, text writers have stated that the question of whether a waiver or estoppel is inferable from the facts, is a question of fact for the jury.

67 Corpus Juris 311

29 Amer. Jur. 1156

Under Rule No. 38 of the new Federal rules, it is stated that no waiver of jury trial results from the union of legal and equitable issues or causes of action.

3 Moore's Fed. Practice (1945 Pocket Supplement) Page 5, Page 21.

The inclusion in a Complaint of a fraudulent transfer cause of action would not deprive a party

of jury trial as to other causes of action of a legal nature.

Elkins vs. Noble, 1 Fed., Rules Dec. 357.

“As it seems to the Court, whether the Complaint in this action is regarded as an action at law, with equitable relief incidentally prayed for, or whether the Complaint be considered as an action at law and a suit in equity joined, the parties are, as a matter of right, entitled to a trial by jury on all legal issues raised, if demand for a jury is made as the rules provide.”

U. S. vs. Connolly, 3 Fed. Rules Dec. 417.

The question of whether an action involving facts similar to those present in this case is primarily a law action or an equitable action was considered by the Supreme Court of Washington. In that case the issue was over whether the insured could recover notwithstanding that the property at the time of the loss was located outside the trading limits specified in the policy. The Court held that the action was primarily one at law and that a jury trial was proper.

Reynolds v. Canton Insurance Office, 98 Wash. 425, 167 Pac. 1115.

In a later part of this brief, appellants will discuss more at length their contentions that they could recover on the theory of waiver or estoppel. These issues were tendered by the appellants' Complaint and if found in favor of appellants would have entitled them to recover irrespective of any right of reformation. It was error for the trial court to refuse appellants' request for a jury trial.

2. Facts Entitle Appellants to Reformation of Policy.

The agreement preceding the issuance of this insurance policy was between appellant, Van Meter, and one, Sol Esfeld. (Tr. 82, 83). While prior to April, 1944, Sol Esfeld had been the sole owner of the insurance firm of Lipman & Esfeld who were agents for the appellee, he had sold his interest in the firm to Morton Pinch and Abe Goldman some time in April of 1944. (Tr. 144, 145). However, Sol Esfeld as officer and manager of the American Discount Corporation, continued to occupy the same offices as Lipman & Esfeld and the new partners continued to use the old firm name, Lipman & Esfeld. Appellant, Van Meter, had no knowledge of any change in the status of ownership of the firm of Lipman & Esfeld prior to the fire. (Tr. 102). Further, it appears from Morton Pinch's testimony that in practice, Mr. Esfeld continued to arrange insurance commitments on behalf of Lipman & Esfeld. (Tr. 141-142, 147). Thus it appears that not only was Sol Esfeld an ostensible partner of the firm which bore his name, but that he had actual authority to arrange insurance commitments for Lipman & Esfeld and the companies for whom that firm was agent.

In the meeting in this office in early November, 1944, Esfeld explained the marine type of policy to Van Meter. It was explained that this policy was

good in any state and it was this type of policy which the firm of Lipman & Esfeld, acting through Sol Esfeld, agreed to have issued. On this point, reference is made to the testimony of Van Meter appearing at pages 82, 83, 115, 116, and 117 of the Transcript.

The form of the policy that was issued conformed to Van Meter's understanding of its terms. Under the heading CONDITIONS on the reverse side of the face of the policy we find at the very top of the page this clause:

“1. TERRITORIAL LIMITS. This policy covers only within the limits of the United States and Canada.”

This clause is the very first of the conditions and the words “Territorial Limits” are set out in big type. Nothing is said in connection with this clause that it might be otherwise limited.

In one of the riders attached to the policy, the clause relied upon by the appellee is inserted. This clause reads:

“3. This insurance covers only within the limits of the States of Washington.”

The significant thing about these two clauses is that the first one is printed and is included in all policies issued on this form, whereas, the name of the state or states to which the other clause might limit the coverage had to be typed in. The minds of the parties had met on the general form of the policy to be issued. If the coverage provided by

that form was to be limited in any way, the appellee would be justified in doing so only as a result of an agreement with the insured. It is clear from the testimony of the appellant, Van Meter, that there was no understanding that the broad territorial coverage contemplated by the form of the policy that was to be issued was to be in any way limited.

Mr. Pinch who signed the policy in question admitted that he was familiar with most of the printed provisions of this form of policy. (Tr. 137, 140). It is a reasonable inference that he was familiar with printed condition No. 1 on the reverse side of the form of the policy. He admitted that he was not aware of the presence in the policy of the other clause limiting coverage while in the State of Washington. (Tr. 139-140). If this agent then knew of the provision which defined the territorial limits as being the United States and Canada and was not aware of the typewritten provision purporting to limit coverage to the State of Washington, the obvious conclusion is that he intended to issue a policy covering the property anywhere in the United States.

The fact is, as the evidence shows, that this typewritten word "Washington" was inserted purely through inadvertance and contrary to the understanding and agreement of the parties.

The later actions of the parties point indelibly to

the fact that they both regarded the insurance in effect notwithstanding the property's location outside the state. After knowledge had been brought home to them by Van Meter's letter of May 14, 1945, appellants' exhibit 4 (Tr. 50-51) that the property was in Oregon, Lipman & Esfeld wrote demanding payment of the balance of the premium. They issued loss payable clause to Granning & Treece in Portland and wrote various other letters, the effect of which was to lead the appellant, Van Meter, to believe that the insurance was in effect. These later actions will be discussed more at length on the proposition that they constituted a waiver or an election. They, however, have a bearing on the issue of appellants' right to reformation because they show a consistent manifestation of an understanding by the appellee's agent, that the policy still covered the property notwithstanding its location outside of the State.

At no time prior to the loss did the appellant, Van Meter, see the policy. (Tr. 103). It was held until about April 20, 1945, in the office of the American Discount Corporation which office was also occupied by Lipman & Esfeld. The policy was sent to appellants, Granning and Treece, on or about that date where it was inspected by J. R. Mullins, one of the employees who failed to notice the clause limiting coverage to the State of Washington. (Tr. 126). Appellants Granning and Treece, were not the ap-

pellant, Van Meter's, agent. Furthermore, their failure to notice this provision or take exception to it is easily understandable when viewed in the light of the fact that they wrote a letter to Lipman & Esfeld, Appellants' Exhibit 4, stating that: "In order that we may be fully protected," please issue a loss payable endorsement. Furthermore, one casually reading the policy would most likely notice condition No. 1 at the top of the reverse side which specified that the policy covers within the limits of the United States and Canada.

Briefly reviewing the facts, we find the uncontradicted testimony of Van Meter that Esfeld, acting for Lipman & Esfeld, agreed to have issued a policy that was good in any state. The printed form of the policy that was issued provided coverage that was good anywhere in the United States and it was only by virtue of the insertion of typewritten matter in an inconspicuous place that the fact of the property's location in Washington was made a condition to the continuance of the coverage. The agent, Morton Pinch who signed the policy, admitted that he was not aware of the provision limiting the coverage of the policy only while the property was located in Washington. (Tr. 140). After knowledge of the removal of the property outside the State, the agents, Lipman & Esfeld, executed and sent loss payable clauses to the appellants, Granning and Treece, and had at least two ex-

changes of correspondence with appellant, Van Meter, in which not the slightest suggestion is made about protection not being in effect outside the State, but on the contrary the letters are couched in language leading Van Meter to believe that the coverage was in effect.

The facts speak for themselves and they admit of only one conclusion, namely, that when this insurance was ordered, it was agreed that this type of policy with its broad territorial coverage was to be issued and there was no agreement that its provisions were to be limited by any clause such as was inserted here. These facts entitle appellant to reformation.

“Reformation of an insurance policy may be had, in general, where, by reason of fraud, inequitable conduct, or mutual mistake, the policy as written does not express the actual and real agreement of the parties. More particularly, if by inadvertence, accident, or mistake the terms of a contract of insurance are not fully or correctly set forth in the policy, it may be reformed in equity so as to express the actual contract intended by the parties if the mistake is mutual or if there has been fraud or inequitable conduct by one of the parties to the contract.”

29 Amer. Jur. 237.

The rules governing the reformation of written instruments are applicable to the reformation of an insurance policy.

Bjorklund v. Continental Casualty Company,
161 Wash. 340, 297 Pac. 155.

Miller v. United Pacific Casualty Ins. Co., 187 Wash. 629, 60 Pac. (2) 614.

To entitle one to reformation, actual fraud on the part of the agent need not be shown, it is sufficient to prove by reasonably clear and convincing evidence that the contract as written did not conform to the understanding and intention of the parties.

Thompson v. Phoenix Insurance Co., 136 US 287, 34 L. Ed. 408, 10 Sup. Ct. 1019.

Day v. Fireman's Fund Insurance Company, 67 Fed. (2nd) 257 (Fifth CCA).

Home Insurance Company v. Sullivan Machinery Company, 64 Fed. (2nd) 774 (10 CCA).

Springfield Fire and Marine Insurance Co. v. Martin, 77 Fed. (2nd) 492.

Appellants' understanding of the theory on which the trial court sustained the appellee's challenge to the sufficiency of the evidence was that the insured was absolutely chargeable with knowledge of the terms of the policy having in mind particularly the decision of this court in the case of *Fidelity and Guaranty Fire Corporation v. Bilquist*, 99 Fed. (2) 333, 108 Fed. (2nd) 713 and because of that fact, reformation and recovery on the policy must be denied. In a later section of this brief, the above mentioned case will be discussed at greater length. For the present, the attention of the Court is invited to certain other authorities.

In an early case in Washington involving an action on a fire insurance policy, the Washington Supreme Court held that an insured, who signed an

application which contained a clause limiting the authority of an insurance agent in respect to statements not contained in the application, was not chargeable with knowledge of the limitations where it was printed in small type.

Foster v. Pioneer Mutual Insurance Co., 37 Wash. 288, 79 Pac. 798.

The following statement from American Jurisprudence represents a fair statement of the rule on this question:

““The decisions are not in entire harmony upon the question of the right to reformation where the insured has retained a fire insurance policy without objection to its provisions, and has failed to examine its contents to ascertain whether or not it conforms with the contract agreed upon, although the facts of the cases largely determine the question. The greater number of cases, however, have held, under the facts involved, that the receipt and retention of a fire insurance policy without an examination to ascertain whether or not it conformed with the application made does not defeat the insured's right to a reformation. This result is reached in recognition of the fact that policies of fire insurance are rarely examined by the insured and even where examined are not always enlightening to him, due to the technical and complicated language in which the contract is usually couched. Another practical factor considered in reaching such a result is that the applicant usually tells the insurer's agent of his coverage necessities and relies on the agent for a policy in accordance therewith. For these reasons, most courts do not demand the same degree of vigilance and critical examination of fire insurance policies as would be expected of some other instruments.”

29 Amer. Jur. Sec. 253, P. 244.

"Whether the failure of insured to read and examine the policy is such negligence on his part as defeats his right to a reformation depends on the facts and circumstances, it being sometimes held that there is negligence, but more often that there is not, at least where such failure is not prejudicial to insurer."

44 C. J. S. 1115.

The decisions on this question are numerous, including a number by the various Federal Circuit Courts of Appeal:

Ohio Casualty Ins. Co. v. Callaway, (10th Cir.)
134 F (2) 788;

Kansas City Life Ins. Co. v. Cox, (6th Cir.)
104 F (2) 321;

Liverpool & London & Globe Ins. Co. v. Crosby,
(6th Cir.) 83 F (2) 647;

National Reserve Ins. Co. of Illinois v. Scudder,
(8th Cir.) 71 F (2) 884, 886;

Home Ins. Co. of New York v. Sullivan Machinery Co., (10th Cir.) 64 F (2) 765;

Carson v. Home Fire & Marine Ins. Co., (5th Cir.) 39 F (2) 50.

The foregoing authorities are to the effect that even where the insured has received the policy and had possession of it, he is not precluded from obtaining reformation. In this case, the appellant, Van Meter, never saw the policy. The case is much stronger than where the insured has actually seen and had an opportunity to examine the policy. The logical result of the trial court's view on the matter, is that under no circumstances would reformation

be possible because the knowledge imputed to the insured would be a complete bar to any suit for reformation. Obviously, such is not the law. The books are replete with cases where reformation has been granted.

Each case must be considered on its own facts. In this case, in view of the prominence given the clause that the policy covers within the limits of the United States and Canada as compared to the lack of prominence given to the other clause limiting the insurance to the State of Washington, it would be easily possible for a casual reader of the policy to conclude that the policy was good any where in the United States. A study of the cases on this point should convince one that even if the policy had been delivered to Van Meter and he had inspected it, his failure to have noticed the provision purporting to insure only while in the State of Washington would not preclude his right to reformation.

Appellants submit that the evidence clearly entitles them to reformation and recovery on the policy.

3. Appellants Are Entitled To Recover On Theory of Waiver or Estoppel.

The first question to be considered is whether the provision limiting coverage can be the subject of estoppel or waiver or must appellants' right to recover be predicated exclusively on its ability to prove its right to reformation. A consideration of

the decisions of the supreme Court of Washington and other jurisdictions fully support the appellants' position that this clause in this particular situation may be the subject of estoppel or implied waiver.

In considering this point, it should be born in mind that the provisions of the printed policy provided coverage anywhere in the United States or Canada. The other clause limiting coverage while the property was located in Washington, was only a condition purporting to modify the general scope of the form of policy used.

In a Washington Supreme Court case on this point, *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, the plaintiff had applied for a fire insurance policy on a boat operating between Seattle and Alaska. The application requested that the policy should show that the boat would sail between Seattle and certain points in Alaska. The policy as issued, contained a warranty that during the "currency" of the policy, it would be employed only in certain waters. The fire occurred beyond the trading limits specified in the policy. The case was tried before a jury and from a judgment in favor of the plaintiff, the insurance company appealed. In deciding the case the Supreme Court of Washington said:

"If the appellant or its agent, as the jury found, knew at the time the policy was issued, that the ARNOLD, upon the voyage contemplated, was to go beyond the trading limits prescribed in

the marginal clause, and if the respondents had not consented to such clause, and had no knowledge thereof until subsequent to the fire, then the respondents would be entitled to prevail without a reformation of the policy, upon the theory that the appellant was estopped from asserting the provisions of the policy defining the trading limits to be other than those specified in the application." (98 Wash. 430).

In the case of *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, the Supreme Court of the State of Washington had occasion to consider whether there could be a waiver of a provision in the policy providing that the property would be insured only while located at a certain place. In prefacing its discussion of the facts in that case, the Supreme Court of the State of Washington said:

"We are not inclined to disagree with the authorities holding that an insurer may be precluded by estoppel from asserting conditions of an insurance policy. Assuming there may be a waiver of the conditions against the removal of insured goods to a new location, what were the acts of respondent upon which appellant rely as raising an implied waiver or estoppel?" (152 Wash. 639).

The Court then goes on to review the evidence and concludes that there was neither evidence nor reasonable inference from the evidence that insurance company's agent ever knew that the appellant had moved the goods.

The two cases cited above clearly establish the proposition that under the decisions of the Supreme

Court of the State of Washington, a provision providing that insurance attaches only while the property is located at a certain place may be waived or the insurance company may be estopped to rely on it.

It is a general rule that conditions in a policy of insurance relating to location of the property may be waived.

26 C. J. 281

45 C. J. S. 619.

Couch on his work on Insurance has the following to say on this subject:

“Furthermore, the insurer may waive any breach arising from a removal of insured property from the place or locality described in the policy, either directly or through an authorized agent. Thus, an insurer waives the right to avoid a policy for removal of the goods to a new location after partial destruction, where, with knowledge of such removal, duplicate receipts for the partial loss are executed, in which it is recited that the policy is reduced by the amount acknowledged. And the insurer may be so far charged with notice and knowledge on the part of its agent as to preclude it, by waiver or estoppel, from setting up removal as a defense to an action to recover for loss. To illustrate: Under a provision insuring property only while it remains in the premises where it was when insured, the insurer waives its right to refuse payment on the ground of removal, where it fails to cancel the policy and return the premium on learning the facts, or where, after knowing the facts, its agent or representative induces the insured to incur trouble or expense in order to comply with any provisions of the policy. And a change of location is

waived by the receipt by an agent of the premium, with knowledge of such change.”

3 Couch Cyclopedia of Insurance Law, Page 2445.

In a Texas case, *Yeager v. St. Paul Fire & Marine Ins. Co.* Tex. 166 S. W. (2) 939, a policy of insurance was issued covering the plaintiff's dwelling and household goods. The policy contained a provision purporting to limit insurance on the household goods while located at the address of the dwelling. The plaintiff later sold the dwelling and moved the household goods to some other location. He called at the agents office advising of his sale and executed an assignment assigning the policy to the new owner of the dwelling. Insurance covering the household goods was also inadvertently included in the assignment. The household goods were destroyed by fire at their new location. In an action on the policy the court permitted a reformation of the assignment and held that the provision in the policy relating to location had been waived. In the course of its opinion the court said:

“While the removal of personal property from the location in which it is insured ordinarily constitutes a breach of conditions contained in a Texas Standard Fire Policy so as to avoid the same, it is settled that such provision, as well as those relating to the timely furnishing of a sworn proof of loss, may be waived and the insurer may be estopped from asserting or relying upon the breach of such conditions or promises as a defense.”

Yeager v. St. Paul Fire & M. Ins. Co. Tex. 166
S. W. (2) 939, 941.

The decision of the Washington Supreme Court in the case of *Carew, Shaw & Bernascoin Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2) 689, is not in conflict with the rule announced by the above authorities. That was a case involving insurance against loss of property by burglary while located in a safe. In disposing of the case the Court said:

“The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel.” (189 Wash. 336).

The appellants have no quarrel with this statement when considered in the light of the facts in that case. However, in that case the location of the valuables protected by the burglary insurance was the very essence of the contract. In this case, it is apparent that the exact location has very little to do with the risk and there is no suggestion that the rate or premium was in any sense predicated on the property necessarily being located in Washington. Having in mind the decisions of the Washington Supreme Court in the case of *Reynolds v. Canton Insurance Company*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Ins. Co.*, 152 Wash. 637, 278 Pac. 702, cited above, there is no warrant

for concluding that the rule in Washington as to the applicability of the rules of waiver and estoppel to a situation such as we have involved here is any different than in other jurisdictions. The decisions of the Supreme Court of the State of Washington in the case of *Reynolds v. Canton Insurance Company* and *Henslin v. U. S. Fire Ins. Co.* supra, clearly establishes that a condition relating to location of the property which does not go to the essence of the risk may be waived.

It is likewise the established rule in Washington that the knowledge and acts of the agents of the insurance company are imputable to the company.

Workman v. Royal Exchange Assurance, 96 Wash. 559, 165 Pac. 488;

Staats v. Pioneer Ins. Association, 55 Wash. 51, 104 Pac. 185;

Gaskill v. Northern Assurance Co., 73 Wash. 668, 132 Pac. 643;

Miller v. United Pac. Casualty Ins. Co., 187 Wash. 629, 60 Pac. (2) 714;

Turner v. American Casualty Company, 69 Wash. 154, 124 Pac. 486;

Stebbins v. Westchester Fire Ins. Co., 115 Wash. 623, 197 Pac. 913;

Harper v. Fireman Fund Insurance Co., 154 Wash. 77, 280 Pac. 743.

The facts developed in this case show a clear intention on the part of the insurance company acting by its agent to waive this clause and treat the coverage as still being in effect.

Before moving to Oregon, appellant, Van Meter, discussed his planned move with Sol Esfeld who, as far as the appellant knew, was a member of the firm of Lipman & Esfeld who were the appellee's agents. He also, in discussion with Abe Goldman, one of the members of the firm of Lipman & Esfeld, told of his contemplated move to Oeegon. Finally, if any doubt as to the fact that members of the firm of Lipman & Esfeld had any knowledge of the appellant's, Van Meter, move to Oregon, reference is made to a letter dated May 10, 1945, Pl. Exhibit 4 (Tr. 50-51), which on its face shows that it was written from Wallowa, Oregon. In this letter, Van Meter refers to the heavy expense of moving down there.

In a letter dated May 4, 1945, Pl. Exhibit 16 (Tr. 58-59), Granning & Treece wrote Lipman & Esfeld requesting loss payable clauses on two policies, one of which is the one sued on. In a letter to Van Meter following receipt of Pl. Exhibit 16, Lipman & Esfeld asked him to pay a balance owing of \$204.86 on the premium and sent a bill, Pl. Exhibit 3 (Tr. 47-50). On receipt of a letter back from Van Meter, Pl. Exhibit 4 (Tr. 50-51), explaining his inability to send the money right away, Lipman & Esfeld sent loss payable clauses to Granning & Treece, Pl. Exhibit 17 (Tr. 59-60). In that connection, attention is invited to the fact that the American Discount Company had collected the \$138.00 due on Policy No. TR 8629 (being the one sued on)

when its loan had been paid off in April, 1945. This amount was later turned over by the American Discount Company to Lipman & Esfeld early in June (Tr. 144).

Thus, we have a situation where after having knowledge of the removal of the property from the State of Washington, Lipman & Esfeld, as agent for the appellee, wrote demanding payment and actually received payment of a balance owing on the premium on this policy.

Where the insured demands and accepts payment of a premium after knowledge of circumstances which render the insurance void, it is estopped to take advantage of the provisions which nullifies the insurance.

“It is well settled rule of law that an insurer which, with knowledge of fact entitling it to treat a policy as no longer in force receives and accepts a premium on the policy, it is estopped to take advantage of the forfeiture. It can not treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums.”

29 Am. Jur., Page 653.

“The acceptance of premiums by the insurer with knowledge of a breach of conditions or ground for forfeiture, ordinarily constitutes a waiver or estoppel.”

45 C. J. S. Page 690.

The Supreme Court of the State of Washington quotes the above quoted rule with approval in the

case of *Millis v. Continental Life Ins. Co.*, 162 Wash. 555, 298 Pac. 739.

To the same effect are the following cases:

Staats v. Pioneer Ins. Association, 55 Wash. 51, 104 Pac. 185;

Neat v. U. S. Fidelity & Guaranty Co., 170 Wash. 625, 17 Pac. (2) 32;

Hedrick v. Washington National Insurance Company, 186 Wash. 263, 57 Pac. (2) 1038;

Neiman v. City of New York Insurance Company, 202 Iowa 1172, 211 N. W. 710.

Taylor v. National Union Fire Ins. Co., 140 Tenn. 150, 203 S. W. 830.

Block v. U. S. Fidelity & Guaranty Co., 316 Mo. 278, 290 S. W. 429.

Union Assur. Society v. Tolivar, (5th C. C. A.) 141 Fed. (2) 405.

Aside from the fact of having demanded and received payment of the balance of the premium, the agents of the appellee executed and sent to appellants, Granning and Treece, a loss payable clause knowing at the time that the property was out of the State. This clause was in response to a request from Granning & Treece: "In order that we may be fully protected." The sending of a loss payable clause under such circumstances without mentioning anything about coverage being limited to Washington, was so deceptive as to amount to fraud. Surely, on these facts alone, the appellee should be estopped to rely on the clause purporting to limit coverage to the State of Washington. The execution

and sending of the mortgagee clause coupled with a letter to appellant, Van Meter, advising of its execution and delivery was an affirmative act calculated to lead appellants into believing that the property was insured.

Then, again in August, 1945, there was an exchange of correspondence between appellant, Van Meter, and the appellee's agent, Pl. Exhibit 5, (Tr. 51-53). In order to understand the full import of the letter of August 17, 1945, plaintiff's exhibit 5, it must be considered in connection with plaintiff's exhibit 3, (Tr. 47-50) and plaintiff's exhibit 15 (Tr. 55-57). It will be observed that the statement accompanying the letter of May 1, 1945, Exhibit 3, refers to three policies. The letter of May 18, 1945, Exhibit 15, explains these policies. First, there was a fleet policy covering trucks. Second, there was a contractors equipment policy (being the one sued on) covering the International Tractor and Cargo Logging Arch. There was also insurance on a Buick Coupe.

The language of the letter of August 17, 1945, Pl. Exhibit 5, obviously was calculated to assure Van Meter that inasmuch as they had furnished loss payable clauses to Granning & Treece, they were certain that Granning & Treece had not written any insurance on the equipment that "we had previously insured." The plain inference from this

letter is that Van Meter was protected by the policy that had been issued by them.

Attention is also called to another circumstance present in this case. Condition No. 15 on the reverse side of the policy provides in part as follows:

“15. CANCELLATION. This policy shall be cancelled at any time at the request of the assured; or by the Company by giving fifteen (15) days' notice of cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having actually been paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice, it shall retain only the pro rata premium.”

It will be noted that this clause provides that if the policy becomes void or “*ceases*” the insured upon surrender of the policy is entitled to a return of the premium, less the customary short rate. On about April 20, 1945, there was a balance of about \$138.00 owing on the premium on this policy. This balance was collected by the American Discount Company when its loan was paid off. (Tr. 144). In collecting this balance the American Discount Company was obviously acting for Lipman & Esfeld and the appellee insurance company. At the time it received that balance of the premium, it had before it appellant Van Meter's signed request (Tr. 64) accompanying the Granning & Treece letter of April 20, 1945, Def. Exhibit A-2, (Tr. 62-64) which reads in part:

“If I am entitled to any refund for unearned interest or insurance premium, you may also return that direct to Granning & Treece.”

Presumably this letter came to the attention of Sol Esfeld who was the manager of the American Discount Company. He was also an ostensible partner in the firm of Lipman & Esfeld and it appears from the testimony of Morton Pinch that in view of Mr. Esfeld's familiarity with the insurance business, they left to Mr. Esfeld the matter of arranging insurance in the name of Lipman & Esfeld in connection with loans financed by the American Discount Company. Mr. Esfeld with knowledge that the property had been moved or was about to be moved out of the State of Washington which would cause the insurance to cease, instead of cancelling the policy which he had in his possession and having Lipman & Esfeld return the unearned premium to Van Meter, sent the policy to Granning & Treece and turned the premium that had been collected over to Lipman & Esfeld.

Assuming that Mr. Esfeld had actual or ostensible authority to act for Lipman & Esfeld at that moment, it is clear that there was an election to treat the coverage as attaching to the property while located outside the State. Appellee will no doubt contend that Esfeld had no authority to act for Lipman & Esfeld. Appellants believe that evidence shows he had actual or apparent authority.

Regardless of whether he did have such author-

ity, the members of the firm of Lipman & Esfeld ratified his action by accepting the balance of the premium collected by the American Discount Company and issuing loss payable clause, with knowledge of the fact that the policy had been delivered to Granning & Treece in Portland, Oregon, and that the property was outside the State.

Viewing these facts in their entirety, it is impossible to come to any other conclusion than that the appellee acting through its agents elected to treat the insurance on this tractor as being in full effect notwithstanding its removal out of the State. The rule applicable to this situation is clearly stated by the Supreme Court of Washington in the following unequivocal language:

“The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estops the insured from relying thereon as a defense to an action on the policy.”

Reynolds v. Travelers Ins. Co., 176 Wash. 36, 46, 28 Pac. (2) 310.

The rule announced above is applicable to the facts of this case. We have not merely one act, but a whole series of acts, all of which lulled Van Meter into the belief that the property was protected

against fire and other hazards. Would not any reasonable person in Van Meter's situation have been led to believe that he was protected? It is submitted that the facts show an implied waiver of this restriction on the property's location in Washington and that the insurance company should be estopped to rely on it.

4. The Decision of the Ninth Circuit Court of Appeals In the Case of *Fidelity & Guaranty Fire Corp. v. Bilquist*, 99 Fed. (2) 333, 108 Fed. (2) 713, Is Not Decisive of the Issues In This Case.

The trial judge seemingly based his conclusion in this case on the holding of this Court in the case of *Fidelity & Guaranty Fire Corp. v. Bilquist*, 99 Fed. (2) 333, 108 Fed. (2) 713.

That case was before this Court on two occasions. The first appeal was from a judgment in favor of the insured. The policy provided that the building would be insured "while occupied only for dwelling house purposes" and the furniture "only while contained in the above described dwelling house building." On the first appeal the Court held that the restrictions mentioned were not merely conditions, but were restrictions on coverage and that recovery could be had only by first having the policy reformed. In commenting on the facts indicated by the record on the first appeal, the Court said:

"We think the proof as it now stands discloses that the parties intended to obtain insurance

which would cover the loss. Langer so intended, as shown by the fact that he was protecting the bank's interest as mortgagee. Under the Washington cases above cited, his intention was imputed to appellant. It is conceded that Langer had authority to issue a policy covering the loss. By mistake such policy was not issued, but one was issued which did not conform to the intention of the parties. Under this evidence, we see no reason why reformation should not be granted." (99 Fed. (2) 335).

The case was remanded to the lower Court to permit amendment to the pleadings and to dispose of it on the theory of reformation.

Fidelity & Guaranty Fire Corp. v. Bilquist, 99 F. (2) 333.

Upon a retrial of the case, judgment was rendered in favor of the insured, the trial Court having found facts entitling the insured to a reformation. In the statement of facts on the second appeal, we find that the facts stated in the opinion to be somewhat similar, but in the opinion on the second appeal, the Court recites the following additional facts:

"The policy was plainly marked "dwelling" in bold print on the outside and the word "dwelling" was used many times in both the policy and the application in such a manner as to inform the casual reader that both instruments referred only to dwelling. The policy was shown to Myhre by Langer at the Bank. Myhre saw that Bilquist's name appeared as owner and told Langer to "change it so my name was on it." No other examination or objection was made. Langer took care of this by writing in Myhre's name as third mortgagee." (108 Fed. (2) 714).

Further along in the opinion on the same page, the Court referring to the facts states:

“In regard to the term of the policy and the premium paid, Myhre testified as follows: “. . . when I discovered the premium was only \$77.00, I made no inquiry as to how long the policy ran. If I had supposed it was a three-year policy, it would have struck me as pretty peculiar. When I saw Exhibit 2, I was under the impression in a way that it was a one-year policy. I thought the rate was awfully cheap.”

The facts referred to above were apparently not before the Court on the first appeal and the Court held that the insured was not entitled to reformation.

Fidelity & Guaranty Fire Corp. v. Bilquist, 108 F(2) 713.

Thus, it appears in that case that one of the insured actually saw and inspected the policy. He made a suggestion for correction. The word “dwelling” was marked in bold type and appeared many times in the policy. Furthermore, it appears that the insured knew what the premium was and that he thought the rate was awfully cheap. In the concluding paragraph of the opinion, it appears that the rate on the building used as a tavern was five times the rate used as a dwelling. It is obvious that the facts in that case do not parallel those involved here, because in the instant case appellant, Van Meter, never saw the policy and there is nothing to indicate that the rate would have any material

difference had the restriction in question not been included.

As to the Court's conclusion in the Bilquist case, that recovery could not be had without reformation, it does not follow that the clause in the instant case cannot be waived or the insurance company estopped to assert it. It appears from that facts in the Bilquist case that if the building was insured for a tavern, the premium rate and presumably the risk would be very much greater. The use to which the building was put obviously effected the risk considerably and might properly be held to be a condition effecting the coverage. In the instant case in view of the fact that the property, under the policy as written, would be covered anywhere within the broad limits of the State of Washington, it seems clear that the exact location was not one of the factors entering prominently into the calculation of the risk.

Except in situations where location is of the essence of the risk, appellants submit that the authorities are almost universally to the effect that the matter of location may be the subject of waiver or estoppel. The Supreme Court of the State of Washington has definitely committed itself to the rule that in fire insurance policies the matter of location may be waived or the insurance company estopped to rely on it.

Reynolds v. Canton Ins. Office, 98 Wash. 425,
167 Pac. 1115.

Henslin v. U. S. Fire Ins. Co., 152 Wash. 637,
278 Pac. 702.

It is submitted that a careful study of the decision of this Court in the Bilquist case in the light of the above mentioned decisions of the Supreme Court of Washington justifies the appellants' position that the trial court was in error in concluding that this Court's decision in the Bilquist case was decisive of the issues in this case.

5. The Court Erred In Sustaining Challenge to Sufficiency of Appellants' case and Denying Motion for New Trial.

Assignment of errors No . 5 and No. 6 are involved in the disposition of the issues argued in the foregoing portions of this brief.

This is an appeal from a judgment of dismissal following the appellee's motion to dismiss on the grounds that the evidence introduced by the appellants showed no right to relief against the respondent. On this appeal, the appellants are entitled to have the evidence and all inferences reasonably to be drawn therefrom viewed in the light most favorable to the appellants.

Federal Deposit Insurance Company v. Mason,
115 Fed. (2) 548.

Viewing the facts as a whole, appellants respectfully urge that there is a combination of facts pres-

ent in this case which entitled them to recover from the appellee.

An insurance company deals through agents. Policies issued by the companies are generally very verbose and couched in language which even the most intelligent have difficulty in understanding. Clients of the insurance companies have grown to depend on the agent for information and advise as to the extent of the coverage. In this case it was agreed that a policy which would cover the appellants anywhere in the United States was to be issued and the later acts and conduct of the agents, Lipman & Esfeld, attest to the fact that that was their understanding. These facts entitle the appellants to reformation. Furthermore, the acts of the appellee's agent definitely show a waiver of the provisions purporting to limit coverage to the State of Washington and an election to treat the insurance as still covering the property.

Appellants respectively urge that the evidence entitled them to the relief prayed for and that the trial court erred in sustaining appellee's motion to dismiss and denying appellants' motion for a new trial.

JONES & BRONSON,
ALBERT OLSEN

Attorneys for Appellant

610 Colman Building
Seattle, Washington.

No. 11535

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. W. VAN METER, B. B. GRANNING and J. D. M.
TREECE, *Appellants,*

vs.

FRANKLIN FIRE INSURANCE COMPANY OF
PHILADELPHIA, PENNSYLVANIA, a corporation,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE HOWARD C. SPEAKMAN, *Judge*

APPELLEE'S BRIEF

FILED

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PAUL P. O'BRIEN,
CLERK

CLARKE, CLARKE & ALBERTSON,
Attorneys for Appellee.

1118 New World Life Building,
Seattle 4, Washington.

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CLARKE, CLARKE & ALBERTSON,
Attorneys for Appellee.

1118 New World Life Building,
Seattle 4, Washington.

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APPELLEE'S BRIEF

STATEMENT OF THE CASE

In order to properly present appellee's theory it will be necessary to make reference to certain facts omitted from appellants' statement of case and to comment upon certain logical inferences to be drawn therefrom.

Appellants bring suit as insured and loss payees under an insurance policy issued by appellee company covering certain logging equipment against loss by fire while located in the State of Washington. The equipment was moved first to Oregon and then to Cali-

fornia where it was involved in a fire which caused the damage for which recovery is sought.

Appellants first request reformation on the ground that the restriction of coverage to the State of Washington was contrary to the initial agreement between appellant Van Meter and the company as to the type of policy to be afforded, and contend secondly, that the company has so conducted itself as to be estopped to assert the coverage restriction.

The essential facts are briefly as follows:

Lipman & Esfeld, an insurance local agency representing various insurance companies, including appellee, and the American Discount Company, a financing concern, shared office space in the Smith Tower in Seattle. Appellant Van Meter, who was in the logging business, had upon various occasions for about five years financed his equipment through the American Discount Company and obtained insurance thereon through Lipman & Esfeld.

During this course of dealing, said appellant had been logging in various portions of the State of Washington (Tr. 83, 84). In November of 1944 he went to the aforesaid office in the Smith Tower and talked with Sol Esfeld, an officer of the American Discount Company and a former owner of the Lipman & Esfeld insurance agency, for the purpose of financing and insuring the logging equipment here in issue. Although at that time the ownership of the insurance agency had been transferred to Morton Pinch and Abe Goldman, Van Meter claims to have had no knowl-

edge of the transfer and to have proceeded upon the assumption that Esfeld still owned the agency.

The financing was arranged and appellant states upon the bottom of page 4 and the top of page 5 of his brief that Esfeld then agreed to cause to be issued a policy of marine insurance that would cover in any state.

We respectfully suggest that the record does not bear out this statement. While appellant was on the stand the trial judge made specific inquiry as to this point. Upon pages 116 and 117 of the transcript will be found the following questions and answers:

“THE COURT: Do I understand you to say that he explained that to you?

THE WITNESS: Yes.

THE COURT: What did he say that was?

THE WITNESS: That a Marine policy differed in the one way that it was good any place; a Marine policy—what it suggested to me was for boats or heavy industrial machinery, or something of that nature to be moved.

THE COURT: Did he say anything about it covering property out of the State of Washington?

THE WITNESS: I don't think so. I don't think it was discussed either way.”

And on Tr. 118 the following:

“THE COURT: What was said by either of you or him about insurance that covered you out of the State of Washington?

THE WITNESS: Well, I can't positively say just what was said.

THE COURT: Was there anything said about it?

THE WITNESS: I just wouldn't want to answer that 'Yes' or 'No' and be honest with you."

While appellants contend that Sol Esfeld and his associates knew from the first that appellant Van Meter was contemplating a move of his business operations to the State of Oregon, and infer therefore that they should have arranged to afford him unlimited insurance coverage, it is interesting to note that when definite advices of the proposed move were received some five months after the issuance of the policy, Mr. Esfeld refused additional financing and suggested that the entire operation be refinanced in the State of Oregon for reasons as expressed by Van Meter himself as follows

"Answer: Well, they didn't like to do it because I would be out of the State—and so far out of the State. Walola is quite a long ways away. They suggested that I try to get it refinanced in Oregon some place if I was going to leave the state." (Tr. 87)

Also Van Meter himself admits that it was not until the time of this refinancing that he definitely decided to go to Oregon (Tr. 72).

He further states that he then went to Portland and was able to arrange refinancing within two or three days (Tr. 87). The refinancing concern, appellants Granning and Treece of Portland, Oregon, wrote the American Discount Company under date of April 20,

1945, enclosing a check for the full amount owed by appellant to the American Discount Company and requesting that all "papers, titles, notes, mortgages, insurance policies and other papers" be forwarded in accordance with an enclosed authorization signed by appellant Van Meter. These documents were introduced in evidence as defendant's Exhibit A-2 and appear upon pages 62, 63 and 64 of the transcript.

At this time the insured property was still located in the State of Washington and it was not moved to Oregon until after the refinancing transaction was completed. Appellant Van Meter testified:

"Answer: Yes, you see I wouldn't move the equipment out of the State until this finance company was satisfied up here.

Question: So if the evidence shows that they were paid off about April 20 then you would say what as to the time of your moving?

Answer: Between April 20 and the 10th of May would cover it easy enough. We were several days getting over there." (Tr. 88)

Prior, therefore, to the removal of the insured property from the State of Washington, the policy in suit was received by appellants Granning and Treece, the Portland finance company, who obviously, at least insofar as appellee is concerned, took possession of it as representative of all appellants and it was then examined as to acceptability by John Mullins, their office manager, who made no suggestion except to request an endorsement naming his firm as loss payee.

Appellants then had possession over six months

prior to the loss of the insurance policy which plainly restricted its coverage to losses occurring within the State of Washington. At the time of the refinancing the property was in the State of Washington and if the appellants saw fit to move it out of the coverage limits the burden was upon them to arrange other insurance or to specifically submit to appellee company the question as to whether or not it would extend its coverage and if so for what additional premium.

It is to be noted that there is no contention that appellee or anyone connected with it had any knowledge of the ultimate moving of the equipment to California where the loss actually occurred (Tr. 119-120).

A more detailed resume of the facts upon particular points will be set forth in the argument relating thereto.

ARGUMENT

Appellants segregate their argument into the following headings:

1. Appellants entitled to jury trial.
2. Facts entitle appellants to reformation of policy.
3. Appellants are entitled to recover on theory of waiver and estoppel.
4. The decision of the Ninth Circuit Court of Appeals in case of *Fidelity Guaranty & Fire Corporation v. Bilquist*, 99 F.(2d) 333, 108 F.(2d) 713, is not decisive of the issues in this case.
5. The court erred in sustaining challenge to sufficiency of appellants' case and denying motion for new trial.

We will cover substantially the same ground under the following headings which will be discussed in order:

1. Coverage of an insurance policy may not be extended from one state to another by waiver or estoppel but such extension can only be accomplished by reformation.
2. Reformation will be granted only where it appears by clear, cogent and convincing testimony that there was mutual mistake or fraud on the part of the insurance company.
3. The insured is presumed and required to know the provisions of an insurance policy and must seasonably advise the company if he objects thereto. Failure to do so will constitute negligence which will prevent reformation.
4. There was no error in the denial of a jury trial.
5. The trial court was correct in granting dismissal at close of appellants' case.

Before proceeding with a discussion of the above mentioned points separately, general comment will be made as to the facts and the rulings of the Washington Supreme Court in connection therewith in the case of *Carew, Shaw & Bernascoin, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 P.(2d) 689, for the reasons hereinafter set forth. It is indeed seldom that every pertinent material issue involved in a piece of litigation is found to have been decided by the Supreme Court of the very state wherein the cause of action arose. The *Carew* case, *supra*, does that very thing for the case here under consideration and since the issues are to be determined according to the law of the

State of Washington (*Erie Railway Co. v. Tompkins*, 304 U.S. 64), the *Carew* case alone should be conclusive to the effect that the judgment of dismissal as entered by the trial court should be affirmed.

That case involves a policy of burglary insurance upon a safe. A preliminary written binder had been issued covering burglary from the entire safe. The policy as subsequently written restricted coverage to burglary from a chest located within the safe. The policy was issued for a three-year term and a little over a year from the inception date the safe was burglarized, \$14,000.00 being taken therefrom but nothing from the chest inside. The insurance company denied liability upon the ground that its policy covered only burglary from the chest and the insured brought suit contending, first, that the company was prevented under the doctrine of waiver and estoppel from urging the coverage limitation, and, second, that the policy should be reformed so as to cover the entire safe.

Trial was had to a jury which returned a verdict in favor of the plaintiff but the trial judge entered judgment non obstante verdicto in favor of the defendant.

In affirming this judgment and disposing of the various issues, which are identical to those in the case at bar, the Washington Supreme Court used the following wording:

“The respondent does not seek to void the policy for breach of any condition or for any other reason. This is a case in which the assured seeks

to extend the coverage of the policy. That can be done only by reformation. (page 336)

“One may not, by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make. The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel. (page 336)

“The sole question presented was an equitable one; therefore, the verdict of the jury is in no way conclusive, it is merely advisory. (page 336)

“The rules of law governing the reformation of written agreements are applicable to the reformation of an insurance policy. An insurance contract is no different from any other contract, when the rules of law governing the reformation of written agreements are to be applied to it. *Bjorklund v. Continental Casualty Co.*, 161 Wash. 340, 297 Pac. 155. It is a rule so well-settled as to need no citation of sustaining authority that a written instrument, which constitutes the contract between two parties, will be reformed only when fraud or mistake is shown by clear, cogent, and convincing evidence. If, as in the case at bar, the evidence is in sharp conflict or any doubt exists as to the intent of the parties, reformation will not be granted.” (pages 336-337)

“Even if we did not agree with the trial court that the policy truly reflects the quotation made to Shaw, the negligence of appellant would defeat

its action for reformation. Appellant is presumed and is required to know the provisions of the insurance contract, as it would any other written contract into which it enters. It will not do for appellant's vice-president to say that he did not read the policy. Whether he or any of the other officers or agents of appellant read the policy, is immaterial. It was appellant's duty to read the policy, and the law says that that was done. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955; *Hayes v. Automobile Ins. Exchange*, 126 Wash. 487, 218 Pac. 252; *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.(2d) 661; *McCann v. Reeder*, 178 Wash. 126, 34 P. (2d) 461; *Kelley v. von Herberg*, 184 Wash. 165, 50 P.(2d) 23."

It will be seen that each of the involved issues is succinctly disposed of in the foregoing decision.

In the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 108 F.(2d) 714, the decision referred to by the trial judge, in orally announcing that he would dismiss appellants' case as showing no grounds for relief, this court has specifically approved and adopted the major principles of the *Carew* case, *supra*.

Since the facts in that case also were surprisingly similar to those in the case at bar, we will also discuss this decision preliminarily.

These facts may most easily be chronicled by a direct quotation from the decision itself, where in it is stated:

"Sometime prior to July 23, 1935, appellee John Myhre and appellee Bilquist bought real property at Manchester, Kitsap County, Wash-

ington, consisting of four lots with a building thereon, known as the Manchester Inn. On July 23, 1935, appellee executed a note secured by the property purchased to the Kitsap County Bank for \$1500.00 which was used as part of the purchase price for the property. Frank E. Langer was president of the Bank, and he was also an agent of appellant for soliciting and writing insurance. He asked and secured from Myhre permission to write the insurance on the property, required by the bank on all such property upon which a loan was granted. Langer had known for several years that the property in question had not been used exclusively as a dwelling place, but that it was intended to be and was actually used instead as an inn, hotel and tavern. He asked for no information but filled out a form which was sent to Seattle, and the policy in question was prepared and sent back to him. Langer signed the policy as resident agent, and placed it with the note and mortgage, then in the Bank's possession." 108 F.(2d) 713.

The policy as issued covered a dwelling house, and, a loss having occurred, the insurance company defended, among other things, upon the ground that at the time thereof the premises were being used as a hotel, inn and tavern. In reviewing the decision of the trial court, which had granted reformation, the Circuit Court stated:

"The law of Washington is well settled to the effect that one who will not use the opportunities open to him to determine what his contract is, and if such opportunities would probably have

revealed the defect, he cannot have reformation for mistake. * * * ”

It is further stated:

“Certainly the insured has some duties as well as the insurer. The insured owes the obligation to examine his policy and to inform the insurance company wherein it is not as he intended it.”

Further reference will be made to both the *Carew* and *Bilquist* cases in the various specific subheadings hereinafter discussed.

1. Coverage of an Insurance Policy May Not Be Extended from One State to Another by Waiver or Estoppel but Such Extension Can Only Be Accomplished by Reformation.

In the middle of the pertinent coverage provisions of the policy sued upon, to-wit, between paragraph 2, which delineates the machinery covered, and paragraph 4, which specifies the perils insured against, is found paragraph 3, which reads:

“This insurance covers only within the limits of the state of Washington.” (Tr. 12)

The case of *Carew, Shaw & Bernasconi, Inc., v. General Casualty Co.*, 189 Wash. 329, 65 P.(2d) 689, to which we have hereinbefore referred at some length, definitely and unequivocally lays down the rule which we have set forth in this heading and we refer to our quotation therefrom upon page 8 of this brief.

The decision recognizes that waiver or estoppel may operate to prevent an insurance company from urging a breach of warranty or condition which would other-

wise void a policy but definitely holds that the doctrine cannot be used to enlarge or extend the coverage itself.

Appellant cites the Washington case of *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, which involves, not a limitation of coverage, but a warranty as to the waters wherein a vessel would be operated. *Dicta* is also cited from the case of *Henclin v. U. S. Fire Ins. Co.*, 152 Wash. 637, 278 Pac. 702, which was not necessary to the decision involved and which in any event should be considered as being expressly overruled by the definite wording in the *Carew* case, *supra*. Texts and decisions from other states are also cited but we are governed here by the law of the State of Washington and this is set forth in the *Carew* case.

While the aforesaid rule would seem conclusive, we will nevertheless discuss briefly the factual situation relating to this claim of waiver and estoppel.

Appellants base their argument upon the proposition that appellee's agent, and persons whom appellant Van Meter had the right to assume were appellee's agents, had knowledge of his contemplated move to Oregon; that appellee issued an endorsement changing the name of the loss payee on his policy from the American Discount Company to appellants Granning and Treece, and that appellee's agent mistakenly attempted to collect the balance of the premium due under the policy. With regard to the premium, the fact was that payment of the balance due had been included in the refinancing check sent by Granning and Treece to the American Discount Company, but

this fact was unknown to Morton Pinch of the agency firm. (Tr. 144)

It is to be remembered that at the time the American Discount Company in response to specific requests of appellants Granning and Treece accompanied by the authorization of appellant Van Meter (Defendant's Exhibit A-2. Tr. 62, 63 and 64), forwarded the policy to them in Portland, the insured machinery was still in the State of Washington and within the coverage of the policy. (Tr. 88)

As far as the American Discount Company was concerned, which company, incidentally, has no connection with appellee, it was merely following instructions in forwarding the policy and other papers to appellants Granning and Treece who were taking over the financing. If and when the subject of insurance was actually moved out of the State of Washington so that it would not be covered by the policy of insurance, the burden would seem to be upon Granning and Treece to either procure other coverage or specifically submit to appellee insurance company the proposition as to whether it would extend its coverage to the State of Oregon and, if so, for what additional premium.

The office manager for Granning and Treece, John Mullins, examined the policy and made no other request than that a loss payable endorsement be issued in favor of Granning and Treece (Tr. 125, 126 and 127). There is no mention in this request as to whether or not the equipment had been moved to the State of Oregon (Tr. 58, 59), and in fact it does not

definitely appear anywhere in the record exactly when the move was made, appellant Van Meter simply stating that it was somewhere between April 20th and May 10th (Tr. 88).

This correspondence was directed to the attention of the Lipman & Esfeld insurance agency and was handled by Morton Pinch, one of the partners therein, who, probably because of the fact that the equipment was being refinanced and having no knowledge that the refinancing check included the premium balance, immediately made an effort to collect the balance of premium he thought to be owing.

While in the course of correspondence relating to the premium, Pinch received information from which it could be logically inferred that the insured property had been moved to the State of Oregon, he was never at any time requested to take up with the company the question as to whether or not the coverage would be extended. Also, at the time he did not even have in mind the fact that the policy contained a provision restricting its coverage to the state of Washington (Tr. 139, 140).

It is obviously impossible for an insurance agent to keep in mind at all times the various provisions of the numerous policies issued for a great number of different insureds and to determine whether certain facts which may come casually to his knowledge might constitute a violation of some of such provisions.

As herein before stated, appellants had exclusive knowledge of all the pertinent facts, they were legally

bound to know the terms of the policy, and when they moved the property out of the state the burden was on them to make provision to have it covered in the new location.

Another and most decisive point is that it is nowhere contended that appellee or its agents had any knowledge whatsoever of the subsequent removal of the equipment from the state of Oregon to the state of California some five months prior to its destruction by fire.

Even if, by some stretch of the imagination, it should be held that there was a waiver or estoppel which would operate to extend the coverage into the state of Oregon, how could it be similarly extended to cover a loss in California when neither the company nor its agents even know that the equipment had been sent down there?

It is submitted, first, that policy coverage cannot be extended by waiver or estoppel, second, that there are no facts to support waiver or estoppel, and, third, that it would in no event extend to the move to California.

2. Reformation Will Be Granted Only Where It Appears By Clear, Cogent and Convincing Testimony that There Was Mutual Mistake or Fraud on the Part of the Insurance Company.

The rule of law laid down by this heading has been adopted by the Supreme Court of the State of Washington in the *Carew* case, *supra*, and we refer to the applicable quotations on page 8 of this brief.

An examination of the facts will reveal that appellants have entirely failed to sustain this burden.

Appellants begin their argument upon this point with the statement that Esfeld, while apparently acting on behalf of the insurance local agency firm of Lipman & Esfeld, agreed to issue a policy which would cover in any state in the United States. We submit that, as stated in our opening comments upon the facts, the record does not substantiate this contention.

Appellants' contentions with reference to reformation are based entirely upon the testimony of the appellant Van Meter and his statements fall far short of complying with the requirement.

The most that can be said for the portions of the record referred to in appellants' brief upon this point is that there was some discussion of a marine type of policy which would cover without limitation as to location and that the appellant Van Meter concluded that this was the kind of policy he was to have. In answering specific inquiries made by the court, however, Van Meter carefully avoided making any statement to the effect that Esfeld actually agreed to issue such a policy. We refer to the following questions and answers.

THE COURT: Did he say anything about it covering property out of the state of Washington?

THE WITNESSS I don't think so. I don't think it was discussed either way. (Tr. 117)

THE COURT: What was said by either of you or him about insurance that covered you out of the State of Washington?

THE WITNESS: Well, I can't positively say just what was said.

THE COURT: Was there anything said about it?

THE WITNESS: I just wouldn't want to answer that yes or no and be honest with you." (Tr. 118)

In this testimony the appellant Van Meter was relating to a conversation had between himself and Sol Esfeld, an officer of the American Discount Company, a finance concern, and a former owner of the insurance local agency of Lipman & Esfeld. Van Meter had called upon Esfeld for the purpose of financing the purchase of his equipment and in connection therewith also made arrangements for the placing of insurance.

According to Morton Pinch, one of the partners in the Lipman & Esfeld insurance agency and the person who countersigned the policy on behalf of such agency, the order for the insurance was relayed by Sol Esfeld to an employee of the insurance agency who, in turn, forwarded the information relating thereto to the Seattle branch office of appellee insurance company for the reason that such branch office passed upon this type of risk and did the actual physical work of preparing the policy to be issued (Tr. 141, 142). When the policy was so issued by the branch office of appellee company it was forwarded to the agency, examined and countersigned by Mr. Pinch and delivered to the

American Discount Company as mortgagee of the equipment (Tr. 142).

An examination of the policy of insurance which was introduced in evidence as Plaintiff's Exhibit No. 1 and the original of which, as appears on page 72 of the Transcript was forwarded to this court as a part of the record on appeal, will reveal that the basic policy is a transportation policy, the printed conditions of which limit the coverage to the United States and Canada but that there was attached thereto a form entitled "Inland Marine Department. Contractor's Equipment Floater Insurance," paragraph 2 of which contains a typewritten schedule of the machinery insured, paragraph 3 containing the printed wording:

"This insurance covers only within the limits of the State of"

in which blank the word "WASHINGTON" is typed in capital letters. Paragraph 4 contains a list of the hazards insured against.

It would be utterly impossible for any one making a real check of the property covered and the hazards insured against to overlook this plainly designated coverage restriction as to location.

It is well settled law that such a specific coverage limitation, especially when partially typewritten upon the coverage form or rider, will prevail over the broader provisions of the basic policy. Am. Jur. 29, Insurance, Sec. 162, page 178. Cooley's Briefs on Insurance, 2nd Ed., Vol. 2, page 1012. Couch's Cyclopedia

of Insurance Law, Vol. 1, page 312. *Miller v. Penn Mutual Life Ins. Co.*, 189 Wash. 269, 64 P. (2d) 1050; see page 276 of the Washington report.

It is entirely plain that, insofar as the appellee insurance company is concerned, it intended to and did issue a policy covering only within the limits of the State of Washington.

Certainly it cannot be said that the appellant has met the burden of establishing by clear, cogent and convincing evidence that there was fraud or mistake on the part of the insurance company.

3. The Insured Is Presumed and Required to Know the Provisions of An Insurance Policy and Must Seasonably Advise the Company If He Objects Thereto. Failure To Do So Will Constitute Negligence Which Will Prevent Reformation.

This rule is strongly set forth in the two leading cases which are primarily decisive of the issues here presented, to-wit, *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co.*, *supra*, and *Fidelity & Guaranty Fire Corporation v. Bilquist*, *supra*, both of which cite many Washington cases in substantiation thereof.

Appellants cite cases from certain other jurisdictions which it is claimed lay down a contrary rule. We are here, however, concerned with the rule of the State of Washington and it is so well settled that there is no need to consider outside authority.

Appellants further contend that the application of this rule would seemingly prevent reformation under all possible circumstances. This is obviously not the

case, as the rule would not apply where a loss occurred before the insured had had a reasonable opportunity to examine the policy, discover the mistake and advise the insurance company thereof. The rule is simply to the effect that an insured, like any other party to a contract, must use reasonable diligence to apprise himself of the terms thereof and, if they are not in accord with his original understanding, to promptly advise the other party of his contention.

In the case at bar, the policy was issued as of November 10, 1944 (Tr. 11), was held by the American Discount Company as mortgagee until April 20, 1944, at which time, at the specific request of appellant, it was sent to appellants Granning and Treece in Portland and remained in their possession up to the time of the loss in October.

Thus the appellant Van Meter had approximately eleven months within which to examine and make objections to the policy.

Appellants contend that they should not be bound by the rule because appellant Van Meter did not, in fact, actually see the policy. According to the cases herein before cited, however, it was his duty to see it and it is immaterial that he did not exercise his privilege.

This particular point has again been ruled upon by the Washington Supreme Court in the recent case of *Department of Labor & Industries v. Northwestern Mutual Fire Association*, 13 Wn.(2d) 288, 124 P.(2d) 944, wherein the court states, upon pages 292 and 293, as follows:

“Respondents particularly stress the fact that the appellants mailed the policy to the Public Utilities Commissioner of Oregon, where it was held until after the accident, and the insured had never read it. This circumstance was not material. The insured operated his truck part of the time in Oregon, and it was for his benefit, and we may assume at his direction, that the policy was deposited with the Utilities Commissioner of that state. He could have read it had he so desired—the appellant did nothing to withhold or conceal it from him—and he was bound by its provisions.”

Appellants fall squarely within the rule of these cases and their negligence in failing to discover and call to the attention of the appellee company the claimed mistake prevents them from now seeking reformation.

4. There Was No Error in the Denial of a Jury Trial.

The judgment of dismissal from which this appeal was taken was entered at the close of appellants' case in sustaining a challenge to the sufficiency of appellants' evidence to entitle them to any relief. If the trial judge was correct in this ruling, then obviously the case would be subject to dismissal regardless of whether or not it was being tried before a jury.

This question of right to jury trial should, therefore, be subject to consideration upon this appeal only in the event that this court should find that the trial judge was in error in dismissing the case and should order the same sent back for a new trial. It would then

be necessary to determine whether any part of such new trial should be before a jury.

Appellants concede that if their entire case was based upon a plea for reformation of the insurance policy, they would not be entitled to a jury trial. They contend, however, that they were relying upon an additional ground of waiver and estoppel, which issue was triable before a jury.

Under heading No. 1 of this brief, we have submitted argument that the doctrine of waiver and estoppel cannot be invoked to enlarge or extend the coverage of an insurance contract and that there was not, in any event, sufficient evidence upon which to base a finding of waiver or estoppel. If we are correct in either of these contentions, then obviously there is no right to a jury trial.

We further contend that where a case is primarily of equitable cognizance it is discretionary with the trial judge as to whether he will submit any issue to a jury. See *Fitzpatrick v. Sun Life Assurance Company of Canada*, 1 Fed. R. Dec. 713.

5. The Trial Court Was Correct in Granting the Dismissal at Close of Appellants' Case.

In announcing this dismissal, the trial court made specific reference to a Ninth Circuit decision which it is conceded was the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, *supra*, from which we have heretofore quoted at length. This decision was, in turn, based in good part upon the case of *Carew, Shaw & Bernasconi v. General Casualty Co.*, *supra*, from which we have also quoted at length.

The factual situation in both of these cases was very similar to that in the case at bar and an analysis will show that the positions of the plaintiffs in both the aforementioned cases were more favorable than that of appellants.

Appellants have sought to differentiate these decisions and most of the points raised have heretofore been discussed. On pages 26 and 37 of their brief, appellants seek to establish that the coverage restrictions in the *Carew* and *Bilquist* cases, respectively, were of great importance and affected the premium rate whereas in the case at bar the restriction of coverage to the state of Washington was a minor matter which would have no connection with the rate.

It is submitted, on the contrary, that it is common knowledge that every material portion of the subject of coverage, hazards protected against, and location of the risk is part of the essential consideration for a premium on an insurance policy.

There are many differences in the hazards of logging operations as between different locations. Certainly it cannot be said that an insurance company does not have the right to determine for itself under what conditions and circumstances it will assume a risk and the locality to which it will restrict its coverage. It does not lie in the mouths of appellants to state that it is immaterial to appellee insurance company as to whether its liability is restricted to the State of Washington or whether it will cover elsewhere.

The fact remains that the very fire which caused

the damage did not take place in the State of Washington but in the State of California, many hundreds of miles away and under entirely different climatic conditions.

Another point raised by appellants on page 32 of their brief which we have not as yet referred to is as follows. The cancellation provision of the policy is set out to the effect that if the policy is canceled, shall become void or cease, the company shall, upon surrender of the policy, pay a return premium. It is then suggested that since the policy did not cover outside the State of Washington the company should have returned a premium when the insured property was moved into the State of Oregon.

There are two answers to this contention. First, under the policy provision no return premium is due until the policy is surrendered by the insured. The insured did not surrender the policy but on the contrary specifically directed that it be forwarded to Granning and Treece in Portland. Second, at the time of such forwarding the property was still in the State of Washington, subject to the coverage of the policy. The policy would still cover any loss in the State of Washington and even after the property had been moved to Oregon it could still have been returned to Washington so as to come within the coverage. It was, in fact, moved from Oregon to California five months prior to the loss and such move could just as easily have been made to the State of Washington.

To conclude:

1. Appellants have failed to establish mutual mistake or fraud on the part of the insurance company by clear, cogent and convincing testimony but, on the contrary, it affirmatively appears that appellee insurance company never intended or agreed to issue any type of coverage other than that afforded by the policy as written.

2. Appellants were guilty of negligence in failing to discover and give attention to the fact that the coverage was restricted to the State of Washington and are, therefore, prevented from now seeking a reformation to recover a loss occurring in the State of California approximately eleven months after the issuance of the policy.

3. Appellee has been guilty of no act tending to mislead appellants, appellants being particularly conversant with the location of their property and having the duty in the event they desired an extension of coverage to request the same of appellee company, giving it the opportunity of determining whether it wished to cover first in Oregon and secondly in California and, if so, at what rates.

4. Coverage provisions of the policy cannot be extended by waiver or estoppel.

5. The trial court was correct in entering judgment of dismissal at the close of plaintiffs' case.

Respectfully submitted,

CLARKE, CLARKE & ALBERTSON,

GEORGE W. CLARKE,

Attorneys for Appellee.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
For the Ninth Circuit

J. W. VAN METER, B. B. GRANNING and
J. D. M. TREECE,

Appellants,

vs.

FRANKLIN FIRE INSURANCE COMPANY of
Philadelphia, Pennsylvania, a corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

APPELLANTS' REPLY BRIEF

JONES & BRONSON,
ALBERT OLSEN

Attorneys for Appellant

610 Colman Building
Seattle, Washington.

JUN 2 1947



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APPELLANTS' REPLY BRIEF

STIPULATION RELATIVE TO INSUR-
ING ONLY WHILE IN WASHINGTON
MAY BE SUBJECT OF WAIVER OR ES-
TOPPEL.

Appellee argues in its brief that the provision in
the policy involved in this case which stipulates

that the insurance covers only within the limits of the State of Washington is one that cannot be waived or be the subject of an estoppel. The fallacy of its argument is that it assumes that a stipulation in a fire insurance policy relative to location of the property is one of the class of stipulations which affects coverage in the sense that it cannot be waived or be the subject of an estoppel.

Every provision in a policy affects coverage or the protection afforded by the policy to a greater or lesser degree. In some cases it has been stated that the coverage of a policy cannot be extended by waiver or estoppel. However, the courts have not clearly defined exactly what is meant by provisions relating to coverage or restrictions on coverage. There are numerous cases where the doctrine of waiver or estoppel has been applied to hold the insurance company liable where under the written provisions of the policy, the insurance would have ceased or become void.

Furthermore, there is a distinction between a case where the facts relied upon as a ground for waiver or estoppel occur prior to or simultaneously with the issuance of the policy and a case where the facts relied on occur sometime subsequent to the issuance of the policy.

We must approach the consideration of this case with a view of determining whether the Washington court has held that a stipulation in a policy of

fire insurance to the effect that the property is protected only while located at a certain place or within a certain area may subsequently be waived or the insurance company estopped to rely on it.

The specific question as to whether a stipulation in a fire policy relating to location can be the subject of waiver or estoppel has been dealt with in at least three cases before the Supreme Court of the State of Washington, and in each of them the Washington Court held that such a stipulation could be the subject of waiver or estoppel.

Two of these cases, namely, *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, have already been dismissed at some length in appellants' opening brief.

In another case not previously referred to in the briefs, namely, *Norris v. China Traders Ins. Co.*, 52 Wash. 554, 100 Pac. 1025, the Washington Supreme Court had under consideration a factual situation bearing many marks of similarity to the instant case. The facts were that the insured had procured through an agent a policy of marine insurance. The policy stipulated that "the insured in accepting this policy hereby binds himself or themselves according to the following agreements and stipulations . . . 4. Not to use any port or places on the East coast of Asia north of Shanghai, nor islands adjacent thereto except ports of Japan . . . B. The

insured vessel to be employed in navigating in Puget Sound, British Columbia and Alaskan waters." Subsequently the vessel owners desired to send the vessel over to Siberia and inquired of the agent if the vessel would be covered by insurance. The agent informed the vessel owner that the vessel would be covered by insurance. The agent, however, testified that while such conversation took place, he stated that there would be a small additional premium depending on the ports the vessel might make. No endorsement or changes were made in the policy. In affirming a judgment allowing recovery for a loss occurring in waters outside those specified in the policy, the Court held that there had been a subsequent parol waiver of the stipulation limiting the territorial coverage of the policy.

Norris v. China Traders Ins. Co., 52 Wash. 554, 100 Pac. 1025.

This case, and those of *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, all involve policies insuring against fire and similar hazards, and a study of them reveals that the Washington Supreme Court is definitely committed to the rule that provisions in such policies relating to location of the property may be subject of parol waiver or estoppel.

Its holding on this point is in accord with what

is stated as a general rule on this subject by text writers.

26 Corpus Juris 281

45 Corpus Juris Secundum 619

3 Couch Cyl. of Ins. Law, Page 2445.

In the case of *Henslin v. United States Fire Insurance Co.*, *supra*, the Court had before it the question of whether the insurance company could be deemed to have waived a stipulation in the policy that the property was insured only while located at a certain place. In discussing this question, the Court said:

"We are not inclined to disagree with the authorities holding that an insurer may be precluded by estoppel from asserting conditions of an insurance policy."

Henslin v. United States Fire Insurance Co.,
152 Wash. 637, 639, 278 Pac. 702.

The Supreme Court of Washington has not changed its rule on this question. Its decision in *Carew, Shaw and Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2d) 689, dealt with a different class of insurance contract, that is, burglary insurance. In that case, location of the valuables, against whose loss by burglary the insurance was issued, was the very essence of the contract. The incident insured against was the theft of money and valuables from a burglar proof chest within a safe. A vital factor in the risk was whether the money was in the chest inside the safe or merely within the safe. Insurance covering the former in-

stance bore a basic rate of \$5.00 per thousand and in the latter instance a rate of \$16.50 per thousand, and this was made known to the insured at the time the insurance was issued. In the instant case there is nothing to suggest that the risk of loss by fire in Washington would be any greater than in some other state. The question of whether a provision in a policy relative to location of property can be waived or the company estopped to rely on it depends on the type of hazard insured against and whether location is something that entered prominently into the calculation of the risk and premium.

Another ground for distinguishing the *Carew, Shaw and Bernasconi* case is that in that case the circumstances relied on for avoiding the effect of a written policy occurred prior to or at about the time of the issuance of the policy. In the instant case the facts relied upon as a ground for waiver or estoppel occurred subsequent to the issuance of the policy. Where the facts relied upon occur subsequent to the issuance of the policy, the appellants submit that there is no arbitrary rule limiting the type of clause or restriction that can be the subject of waiver or estoppel. In two cases referred to above, namely, *Norris v. China Trades Insurance Co.*, 52 Wash. 554, 100 Pac. 1025, and *Henslin V. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, the facts relied on as a ground for waiver or estoppel occurred subsequent to the issuance of the

policy and in each instance the case was disposed of on the theory that there could be a waiver of or an estoppel to rely on a stipulation limiting coverage while the property was in a certain location. On this basis alone, the instant case and the decisions of the Washington Supreme Court on which appellants rely can be distinguished from the *Bernasconi* case.

In the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 99 F. (2d) 333, 108 F. (2d) 713, the principal fact relied upon for relief, against the stipulation in the policy that the company insured the building "while occupied only for dwelling house purposes," was that the agent Langer "had known for several years that the property in question had not been used exclusively as a dwelling place, but that it was intended to be and was actually used as an inn, hotel and tavern." The knowledge of the agent relied upon as a ground for avoiding the effect of the stipulation insuring only while used as a dwelling house was knowledge he had at the time he issued the policy. If that knowledge, coupled with the fact that a policy was issued, had any implication, it was not that the insurance company was waiving the stipulation relative to use. The implication, if any, flowing from those facts was that the policy issued did not reflect the preliminary agreement of the parties and reformation was the only appropriate remedy.

It also appears from the concluding paragraph of the second opinion, 108 F. (2d) 713, that the rate on the building if used as a tavern was about five times the rate if used as a dwelling. The stipulation about the use of the building was obviously one that had an important bearing on the risk and the premium. One cannot disagree with the court's conclusion that in order to recover in that case plaintiffs were obliged to prove facts entitling them to reformation.

In the instant case there is nothing to suggest that the risk would be any greater outside the State of Washington than within the State. The facts relied upon as a basis for waiver or estoppel occurred subsequent to the issuance of the policy. Appellee's agents who signed the policy, more than any other person, were chargeable with knowledge of the provisions of the policy. After it had been brought to their attention that the insured's property had been moved outside the state, the appellee's agents issued a loss payable clause, requested payment of a balance on a premium and wrote other letters, the effect of which was to lead the appellants to believe that they were protected.

Having in mind the facts in the instant case, it would be difficult to find a more appropriate statement of the applicable rule than that contained in the following quotation from a decision of the Washington Supreme Court:

“The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estops the insured from relying thereon as a defense to an action on the policy.”

Reynolds v. Travelers Ins. Co., 176 Wash. 36, 46, 28 Pac. (2) 310.

After careful study of many cases on this question, counsel for appellants believe that the various cases cited to this court, can be reconciled and the following is submitted as a correct statement of applicable principles:

(1) Where the provision or stipulation is one which enters prominently into the calculation of the risk or involves a description of the property, recovery, notwithstanding violation of the provision or stipulation, where based on knowledge or other facts in existence prior to or concurrent with the issuance of the policy, can be had only upon the theory of reformation and upon evidence sufficiently clear and convincing to entitle one to reformation.

(2) Where the provision or stipulation is one which does not enter prominently into the calculation of the risk, recovery, notwithstanding violation of the provision or stipulation, where based on

insurance agent's knowledge or other facts in existence prior to or concurrent with the issuance of the policy, can be had on the theory of waiver or estoppel. Examples of stipulations or provisions coming within this rule are provisions prohibiting other insurance, removal of property from the area described in the policy, encumbering of property, etc.

(3) Where the effect of a stipulation or provision in a fire policy is sought to be avoided based on facts or transactions occurring subsequent to the issuance of the policy, there is no arbitrary limit as to what kind or class of stipulation can be the subject of waiver or estoppel. It is simply a question of whether the insurance company or its agent by its acts or conduct has led the insured to believe that he was protected against a particular hazard, when in fact he was not protected under the written provision of the policy, and thus has waived the provision or is estopped to rely upon it. In such a situation the question of whether the insured knew of the terms of the policy, goes only to the question of whether the insured relied on or was justified in relying on the acts of the insurance company or its agent.

Appellants respectfully submit that under these principles it is entitled to recover on the theory of waiver or estoppel.

2. EVIDENCE WAS SUFFICIENT TO WARRANT REFORMATION

In support of its contention that appellant Van Meter's testimony was not sufficiently clear and convincing to justify reformation, appellee refers to certain of his testimony appearing at pages 117 and 118 of the Transcript. Appellant Van Meter had previously testified that a marine type of policy had been explained to him which was good any place and it was this type of policy Esfeld agreed to have issued. (Tr. 82 and 83). When questioned by the Court, he reiterated these statements. (Tr. 116 and 117). The Court also inquired of the witness, as to whether anything was said about covering outside the State of Washington, and the witness replied that : "I don't think it was discussed either way." (Tr. 117).

Inasmuch as the type of policy agreed upon contemplated that it would have no territorial limitations, obviously there was no occasion for discussing whether it covered outside the State of Washington or only within the State. Once it had been explained to Van Meter that the policy was good any place, why should he ask whether it was good outside the State of Washington, or why should Esfeld make any statement along that line? The parties were obviously not thinking in terms of State boundaries. That was an element injected into the matter by appellee when it wrote up the policy.

The fact is that Esfeld agreed to have a policy issued insuring Van Meter against fire and other hazards. The property was movable and Van Meter had previously discussed with Esfeld the possibilities of his moving outside the State (Tr. 86, 118). Esfeld having agreed to procure a policy of fire insurance, the issuance of a policy of insurance which insured the property only while in Washington was not in compliance with that agreement.

Van Meter's statement that nothing was said either way about coverage outside the State of Washington, when considered in the light of his other testimony that the form of policy to be issued was one that protected him any place, brings out that there was no agreement that the broad territorial coverage of the form of policy agreed upon was to be limited by the boundaries of any particular state.

Aside from the fact that Van Meter did not agree to any provision that he was only to have protection while the property was in Washington, it appears that Morton Pinch, the agent who signed the policy, was unaware of the presence of this provision in the policy (Tr. 139, 140). The provision that the insurance covers only while within the limits of the State of Washington was a condition limiting the general scope of the policy. How can it be said that it reflected the preliminary agreement of the parties when nothing was said about any such limi-

tation or condition and neither was aware of its presence in the policy. Van Meter understood that a policy good any place was to be issued, and the agent of the appellee, having knowledge of the printed provisions and no awareness of the type-written clause, obviously intended to issue a policy that was good anywhere in the United States. The later acts of both parties attest unequivocally to the fact that they both assumed and understood that there was no condition in the policy limiting the broad territorial coverage contemplated by the printed form of the policy.

3. APPELLANTS' FAILURE TO READ POLICY DOES NOT PRECLUDE RIGHT TO REFORMATION.

Appellee argues rather insistently that appellants were chargeable with knowledge of the terms of the policy and that Van Meter, not having availed himself of an opportunity to examine the policy, was guilty of negligence which would prevent reformation. Here the appellee again relies on the case of *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2) 649.

Let us examine closely that case with this point in mind. In the first place the statement that the insured was chargeable with knowledge of the terms of the policy so as to preclude reformation was not necessary to the decision of the case. In its opinion

the Court said: "The appellant has not shown by clear, cogent and convincing evidence that there was a mistake or fraud in the issuance of the policy requiring reformation of the contract." (189 Wash. 339). Having found that the appellant was not entitled to reformation, the later statement in the opinion that his negligence and failure to read the policy would have precluded reformation in any event and was not necessary to the decision. Furthermore, in that case the facts recited in the opinion show that Lambuth, an agent of the insured who handled the insured's other insurance business, had the policy in his possession. The Court points out that "the most casual examination by Lambuth who was appellant's (insured's) agent and who discussed the policy and coverages with appellant's vice-president would have revealed to their agent the coverage afforded by the policy." The Court goes on to point out that "On October 10, 1934, Lambuth sent the policy to Shaw (vice-president of the insured) who manually handled the policy and maintained it in his possession." (189 Wash. 340). Furthermore, it appears from the statement of facts in the opinion that the basic rate on the insurance against burglary from within the chest was \$5.00 per thousand, while the rate on insurance against theft from the safe itself, which was only fireproof, would take a basic rate of \$16.50. The difference in these rates was fully explained to the insured.

How different is the situation here where the insured never saw the policy. Furthermore, a casual reading of the policy in the instant case would not have disclosed that the property was insured only while in Washington. Much more prominent is the provision that "this insurance covers only within the limits of the United States and Canada."

In support of its statement that it was the insured's duty to read the policy, the Washington Court in the *Bernasconi* case cites several earlier Washington decisions. A reading of these other cases shows that in each instance, except one, the statement was made with reference to a situation where the parties seeking to avoid the effect of the provision in question had signed the instrument. In one case, *McCann v. Reeder*, 178 Wash. 126, 34 Pac. (2) 461, the insured and his agent had received and had taken possession of the policy and neither denied that they had read the policy nor did they deny that they were aware of the false warranties therein. Two of the cases cited, namely, *Hayes v. Automobile Insurance Company*, 126 Wash. 487, 218 Pac. 252, and *Perry v. Continental Insurance Company*, 178 Wash. 24, 33 Pac. (2) 661, involved fire insurance policies. In those two cases it appears that the insured was trying to avoid the effect of false representations contained in an application for insurance signed by the insured. As a general rule it can be said that a person is chargeable with

knowledge of the contents of an instrument he signs. However, to extend the application of that rule to a situation where the insured never signed an application and never saw the policy, and the insurance company's agent knew the insured never saw the policy, would in effect be to hold that in no case would reformation of an insurance policy be possible. That is not the law in Washington or in any other state.

The Washington Court has held that the rules governing the reformation of written instruments are applicable to the reformation of an insurance policy. *Bjorkland v. Continental Casualty Company*, 161 Wash. 340, 297 Pac. 155.

It has held that a party's failure to discover a mistake in a written instrument does not preclude reformation. *Silbon v. Pacific Brewing & Malting Company*, 72 Wash. 13, 129 Pac. 581.

It has also aptly pointed out that if the negligence of the party was to defeat reformation there would be few contracts reformed. It has said:

"The appellants argue that the mistake was the result of the respondent's negligence and that he cannot have his deed reformed. If this were true, there would be few contracts reformed. Mistakes in written instruments are usually due to negligence on the part of one or both of the parties where there is no fraud. This Court has uniformly taken the view that conveyances in real property may be reformed so as to effectuate the actual intention of the parties where there has been a material and mutual mistake

and where that mistake has been shown by clear and convincing evidence.”

Carlson v. Druse, 79 Wash. 542, 548, 140 Pac. 570.

The answer to the question of whether knowledge or means of knowledg precludes reformation is that each case must be considered in the light of its own facts. This is well illustrated by the two decisions of this Court in *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2d 333, 108 Fed. 2d 713. When that case was first before this Court, it appeared from the statement of facts in the opinion that the insurance policy had been issued on about August 19, 1935, and that it had been left with the insured's mortgagee. The fire did not occur until September 12, 1936. It was obvious that the insured would have had an opportunity within that period to have examined the policy if he had been necessarily chargeable with knowledg of the terms of the policy. However, this court, on the basis of the facts then shown by the record, said: “Under this evidence we see no reason why reformation should not be granted.” (99 Fed. 2d 335).

When this case was before this Court the second time, it appeared from the facts that had been developed, that one of the insured who ordered the insurance had actually seen the policy and had had an opportunity to examine it and had noted one or two exceptions to the policy. Likewise, it appears that he was cognizant of the material difference in

the rate. With these facts before it, this Court held that reformation was not permissible. (108 Fed. 713). Thus, in its two decisions in this case, this Court has recognized the difference between a situation where an insured has examined the policy, or has had the policy in his possession, and a situation where the insured never saw the policy or never had it in his possession.

The Court's attention is again invited to the very respectable list of authorities cited on pages 20 and 21 of appellants' opening brief holding that mere failure to read a fire policy in ones possession is not such negligence as will preclude reformation.

In the instant case there was an agreement to issue a policy with broad territorial coverage. There was no agreement that the insurance was to be effective only while the property was in Washington. The subsequent act of both parties attest to the fact that that was the understanding, and, finally, in view of the circumstances, it cannot be said that the insured's failure to examine the policy should preclude his right to reformation.

Respectfully submitted,

JONES & BRONSON

ALBERT OLSEN

Attorneys for Appellant

610 Colman Building
Seattle, Washington

Nos. 12217 and 12221.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL HARRY KASINOWITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and Consolidated Cases.

LILLIAN ADELE DORAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and Consolidated Cases.

BRIEF FOR APPELLEE.

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JAMES M. CARTER,

United States Attorney,

PAUL P. O'BRIEN, *Special Assistant to the Attorney General,*
OLE

ROBERT J. KELLEHER,

Assistant United States Attorney,

MAX H. GOLDSCHNIDT,

Special Assistant to the Attorney General,

600 United States Postoffice and

Courthouse Building, Los Angeles 12,

Attorneys for Appellee.



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BRIEF FOR APPELLEE.

Jurisdictional Statement.

These are appeals, consolidated by Order of this Court, upon stipulation of the parties, from:

(1) Judgments and *sentences* of the United States District Court, for the Southern District of California, Central Division, as to appellants Kasinowitz, Steinberg, and Dobbs, No. 12217 and

(2) *Orders* of the United States District Court, for the Southern District of California, Central Division, as to appellants Doran, Bock, Caress, Blair, Brodsky and Spector, No. 12221.

In case No. 12217 there was entered as to each appellant a criminal "Judgment and Commitment" [R. 31-35].¹

In case No. 12221 there was entered in the District Court as to each appellant a "Judgment, Order and Commitment in Civil Contempt" [R. 66-117].

The District Court had jurisdiction of the proceedings as to all appellants under (new) Title 18 United States Code, Section 401.

This Court has jurisdiction of these appeals under (new) Title 28 United States Code, Section 1291 and Section 1294(1).

The Questions Involved.

(1) Whether answers to any of the questions propounded calling for "yes" or "no" answers as to their knowledge of another person would tend to incriminate the appellants for an offense against the United States Government?

(2) Whether answers to the question calling for their knowledge of the occupation of another would tend to incriminate the appellants for an offense against the United States Government?

(3) Whether the answer to the question for whom was he an organizer, put to the appellant Brodsky, would tend to incriminate him for an offense against the United States Government.

¹References preceded by the letter R. are to the printed Record on appeal.

Statement of the Case.

Each of the appellants appeared individually before the United States Grand Jury sitting at Los Angeles, California, and was asked certain questions which each refused to answer on the ground that the answer might tend to incriminate him.

The appellants Caress, Brodsky and Blair appeared before the Grand Jury after apprehension by a United States Marshal upon a bench warrant issued out of the District Court [R. 44, Caress; R. 52, Blair; R. 61, Brodsky], pursuant to motion of the United States Attorney, based upon the ground that each of said appellants was deliberately avoiding service of subpoena [R. 32, Caress; R. 45, Blair; R. 53, Brodsky].

At various times between October 27, 1948, and January 12, 1949, the appellants Doran, Bock, Spector, Kasinowitz, Steinberg, and Dobbs, appeared before the Grand Jury, pursuant to subpoena, after the District Court had denied a motion brought in behalf of appellants Bock [R. 62] and Spector [R. 268, 269] to quash the subpoena. In the motion to quash as to appellant Bock the moving parties were Frank Edward Alexander, Ben Dobbs, Samuel Harry Kasinowitz and Henry Steinberg [R. 62], who were appellants in Case No. 12081, and as to each of them the motion referred to the original subpoenas served upon them in that case and not to the subpoenas pursuant to which each appeared in the present case.

In regard to the subpoenas pursuant to which the appellants Doran, Kasinowitz, Steinberg and Dobbs appeared

in this case, and subsequently upon interrogation refused to answer questions with which these appeals are concerned, no motion to quash was made.

Upon their appearance before the Grand Jury each of the appellants was advised by the United States Attorney, or by the Special Assistant to the Attorney General that the Grand Jury investigation was not directed toward him, and each was further advised that the Grand Jury was investigating employees of the Federal Government who had made false statements to a Government agency [R. 349, 352, Doran; R. 384, Bock; R. 545-546, Caress; R. 548-549, Blair; R. 532, Brodsky; R. 541, Spector; R. 431, Kasinowitz; R. 438, Steinberg; R. 403, Dobbs].

Each of the appellants with the exception of Blair was asked before the Grand Jury if he was a Federal employee; each stated that he was not and never had been a Federal employee² [R. 353, Doran; R. 385, Bock; R. 546, Caress; R. 532, Brodsky; R. 541, Spector; R. 431, 433 Kasinowitz; R. 439, Steinberg; R. 404, Dobbs].

The appellants Doran, Bock, Dobbs, Kasinowitz and Steinberg further stated before the Grand Jury that they were not personally acquainted with any employees of the Federal Government [R. 353, Doran; R. 387, Bock; R. 431, 433, Kasinowitz; R. 439, Steinberg, and R. 404, Dobbs].

Other references in the record as to the nature and purpose of the Grand Jury inquiry are as follows:

²Brodsky answered that he had not been a Federal employee in the last year; Spector answered that he had not been within the last two or three years.

1. Grand Jury Presentment of appellants Kasinowitz [R. 2]; Steinberg [R. 5] and Dobbs [R. 8].

“* * * the Grand Jury for the United States of America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September 1948 Term, *undertook an inquiry concerning certain employces of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U. S. Code, Revised Title 18, U. S. Code, Section 1001 and other criminal laws of the United States.*” (Emphasis added.)

2. Affidavit of James M. Carter [R. 13].

“That affiant (James M. Carter) and Max H. Goldschein, Special Assistant to the Attorney General, instituted said Grand Jury proceedings because there was referred to them *certain violations of the law concerning individuals, none of whom were the witnesses called before the grand jury, which indicated there had been a violation of Title 18, U. S. C., Sec. 80, or Revised Title 18, U. S. C., Sec. 1001, namely the making of a false statement to a Government Agency; that said grand jury proceeding and the interrogation of the various witnesses called before the grand jury, were part of an investigation into the alleged violation of said statutes.*” (Emphasis added.)

3. Identical allegations, except for name of affiant and name of his associate were made in the Affidavit of Max H. Goldschein [R. 15-16].

4. Caption of Motions for Issuance of Bench Warrant [R. 37, 45, 53].

“In the Matter of the *Investigation by the Grand Jury Concerning Loyalty of Government Employees* entitled ‘Miscellaneous Investigation No. 279, 18 U. S. Code 1001, 18 U. S. Code 80 (old section).’ (Emphasis added.)

5. Affidavits of James M. Carter [R. 39, 47-48, 55].

“That an investigation is now being conducted by the Grand Jury of this District *concerning the loyalty of Government employees and concerning persons who are alleged to have violated provisions of Revised Title 18, United States Code, Section 1001, and Old Title 18, United States Code, Section 80, which sections define the crime of making a false statement to a Government agency concerning a matter within its jurisdiction.*” (Emphasis added.)

6. The trial court’s statement that this was a Grand Jury inquiry of Federal Government employees who had made a false statement in violation of Title 18, Section 1001 [R. 565].

7. Testimony of Roland B. Ahlswede, foreman of the Grand Jury, called as a witness by appellants Dobbs, Kasinowitz and Steinberg, that the witnesses were called in connection with an investigation of false statements made by four Government employees [R. 253].

8. Testimony of James M. Carter, United States Attorney, called as a witness by appellants Dobbs, Kasinowitz and Steinberg that the witnesses were subpoenaed in connection with a Grand Jury investigation of false statements by Government employees [R. 265].

The appellants were asked, refused to answer and thereafter each was ordered by the Court to answer certain of

the following questions, as indicated below, which they refused to do and for which they were found in contempt and committed:

1. "Do you know the names of the officials of the Los Angeles County Communist Party?"
2. "Do you know the table of organization of the Communist Party of Los Angeles County?"
3. "Do you know Dorothy Healey?"
4. "Do you know her business or home address?"
5. "Do you know her occupation?"
6. "Do you know where she can be found or located?"
7. "Do you know whether or not she is married?"
8. "Do you know her husband's name?"
9. "Do you know his occupation?"
10. "What is his occupation?"
11. "Do you know who or what officer of the Communist Party of Los Angeles County is in charge of membership or membership rolls?"
12. "Do you know any person in the County of Los Angeles who advocates the overthrow of the Government of the United States by force and violence?"
13. "Do you know any organization in the County of Los Angeles that has for its purpose the overthrow of the Government of the United States by force and violence?"
14. "Who are you an organizer for?"
15. "Have you seen Dorothy Healey recently?"
16. "Do you know Ned Sparks?"
17. "Do you know Elizabeth Glenn?"
18. "Do you know Mrs. Houdek?"

(The questions vary slightly in immaterial respects from witness to witness as appears to be conceded by all parties).

The numbers opposite the names below indicate the above-numbered questions which the respective witnesses refused to answer after being ordered by the Court to do so:

Doran: 16, 3, 4, 5, 6, 7, 8, 9, 10 [Presentment R. 462-463; Judgment R. 71].

Bock: 3, 4, 5, 7, 8, 9, 10 [Presentment R. 464-466; Judgment R. 79].

Caress: 2, 3, 4, 6, 8, 9, 11, 12, 13 [Presentment R. 452-453; Judgment R. 86-87].

Blair: 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 15, 17, 18 [Presentment R. 457-459; Judgment R. 96-97].

Brodsky: 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14 [Presentment R. 455-456; Judgment R. 106-107].

Spector: 2, 3, 5, 6, 7, 8, 9 [Presentment R. 450-451; Judgment R. 114].

Kasinowitz: 3, 4, 5, 6, 7, 8, 9 [Presentment R. 2].

Steinberg: 3, 4, 5, 7, 8, 9 [Presentment R. 5].

Dobbs: 3, 4, 5, 7, 8, 9 [Presentment R. 8].

Upon the refusal of the several appellants before the Grand Jury to answer the questions above, in each instance there was a hearing in open court to determine whether the privilege of self-incrimination justified the refusal to answer and each appellant was thereafter ordered by the Court to answer the questions indicated above [Doran, R. 383-384; Bock, R. 401; Caress, R. 601-602; Blair, R. 604-605; Brodsky, R. 603-604; Spector, R. 600-601; Kasinowitz, R. 436; Steinberg, R. 443; Dobbs, R. 429-430].

In addition to the hearing in open Court, the witnesses listed below were given an opportunity to tell the Court

privately in chambers, in the absence of counsel, under a sealed transcript, how the answer would tend to incriminate them. While they availed themselves of this opportunity they told the Court nothing that added to what had been adduced in open Court. The sealed transcript was subsequently ordered opened by the witnesses [Doran, R. 380-383; Bock, R. 396-400; Kasinowitz, R. 435-436; Steinberg, R. 441-442; Dobbs, R. 427-429].

Upon being ordered by the Court to answer, each of the appellants was returned to the Grand Jury room where each persisted in his refusal to answer the questions ordered on the ground that the answers would incriminate him.

A presentment to the Court as to each witness thereafter followed upon which there was evidence received in open Court of the refusal of each to answer the questions indicated above, witnesses were called by the appellants and evidence offered in their behalf, at the conclusion of which, and after argument by each side, the Court found the appellants Doran, Bock, Caress, Blair, Brodsky and Spector guilty of civil contempt [R. 506] and the appellants Kasinowitz, Steinberg and Dobbs guilty of criminal contempt [R. 325].

Pursuant to order of this Court, upon stipulation of the parties, the brief filed by the Government in the case of *Alexander et al. v. The United States of America*, No. 12081, is adopted by the Government in support of its position herein and this brief will be confined to a presentation of the factual materials in the record of these cases and an application of the authorities cited in the *Alexander* case brief together with certain new or additional authorities.

ARGUMENT.

I.

The Appellants' Claim of Privilege Is Spurious.

The appellant witnesses in these cases have advanced no argument or authority different from what was offered by the appellants in the *Alexander* case, No. 12081. They contend here as the witnesses did there that the asking of the questions occurred in a particular setting, described by them but unsupported by the record, which somehow transforms these appellants from ordinary witnesses into the role of privileged characters, privileged that is in a manner not available to ordinary citizens or witnesses but only to those who entertain "minority beliefs," which somehow grant them an immunity from the ordinary duties of citizenship.

The appellants here are apparently persisting in the type of argument first advanced by the appellant witnesses in the *Alexander* case, that the interrogation before the Grand Jury of these witnesses "is entirely a political maneuver on the part of the Democratic administration, instituted particularly at this time, with relation to the election for the purpose of attempting to influence the election, not for the purpose of obtaining any information concerning any alleged crime" [Alexander, R. 52, 53]. The proceedings with which the cases at bar are concerned took place after election day.

The appellants contend that they have been subjected to a "grand inquisition against political activities."³ *There*

³Brief for appellants, p. 60.

was no inquiry into the political activities of these witnesses. The record demonstrates that the Government had and has no interest in the political activities of these witnesses. The questions asked indicate no interest in the activities or views of these witnesses. The questions asked plainly show that the Government was interested in ascertaining the facts concerning the crime of making a false statement to the Government by a Government employee, which could be committed only by persons other than the witnesses, as each witness was advised before being questioned before the Grand Jury.

A. The Appellants' Showing Was Immaterial.

The so-called "appellants' showing" is entirely immaterial in law and logic in determining whether the privilege against self-incrimination applies. Their "showing" consists of offers to prove:

(a) That the reason for questioning appellants was to ascertain from them, or others, the whereabouts of the records of the Communist Party (of Los Angeles County).

(b) That Dorothy Healey was generally reputed to be Secretary of the Los Angeles Communist Party.

(c) That this Grand Jury was conducting a drive against the Communist Party under the Smith Act.

(d) That the official position of the Department of Justice was that the Communist Party is an organization in violation of the Smith Act and that a nation-wide prosecution of the Communist Party had begun.

All of the above the appellants offered to prove by hearsay evidence [R. 302, 304, 305, 307, 335, 337, 338, 339, 371-380, 592-593].

In other words, the appellants contend that newspaper articles and columnists' stories, appearing in New York, Los Angeles and Rocky Mountain newspapers, and published reports of a California legislative committee, (although the rankest hearsay evidence as to the truth of any fact therein contained) establish that the Grand Jury proceedings are directed against these appellants. They contend that a privilege against self-incrimination therefore attaches justifying their refusal to give testimony concerning the commission of crime by others.

It is the erroneous contention of the appellants that these news articles, columnists' comments and legislative committee reports spell out a crime *and describe these appellants* as probable participants therein. What other purpose was there for offering this evidence?

Suppose the Attorney General does intend to prosecute all those who advocate the overthrow of the Government by force and violence in every part of the country and wherever the facts warrant. Suppose the Attorney General did direct that the evidence concerning the twelve Communists in New York be presented to the Grand Jury. How are the appellants in this case shown by the record in this case to be connected in any way with the intentions or declarations of the Attorney General?

B. Even if Material and All Evidence Offered Is Deemed Admitted the Privilege Against Self-Incrimination Is Not Established.

For the purpose of argument, if we deem that all evidence offered by the appellants was received it could at most, even if material, tend to show that the purpose of this Grand Jury inquiry was something different than the inquiry into false statements by Government employees. Yet the record is replete with evidence which conclusively establishes that the purpose of the Grand Jury inquiry was the investigation of Government employees who had made false statements to a Government agency. The only witnesses to testify on this subject were the United States Attorney James M. Carter, and Roland B. Ahlswede, the Foreman of the Grand Jury. *They were both called by the appellants* and their testimony on the matter was clear and definite.

C. The Appellants' Assertion of the Privilege Is an Attempt to Play the Role of Martyr and to Create the False Impression of Being Persecuted in Order to Delay the Grand Jury Investigation.

The appellants apparently contend that they are "those whose dissidence of opinion and paucity of members make them helpless victims of official demands for conformity as well as of prejudice or public excitement" (Brief for Appellants pp. 60-61). If theirs is a dissidence of opinion only they know what that opinion is or that it deserves the designation of "dissidence." The record does not show that the Grand Jury was interested in what their opinions

are, or even that they have any. This case is not concerned with opinions entertained by any person, they are not involved, the record does not disclose any and indeed there is not even a bare reference in the record to the opinion of any one.

If there is any "official demand for conformity" involved in this case the Government is without knowledge of it. The record is barren of any such reference. The Government has made no demand for conformity, except for conformity to the elementary requirement that the orders and processes of the Court be obeyed.

If these appellants are the "victims of prejudice or public excitement" the basis of their claim is entirely obscure. The record does not disclose them as victims and nowhere does "prejudice or public excitement" appear. The degree of their own private excitement is manifest from the mere making of such a statement as also is it in their statement, "Appellants feel it necessary to express to this Court a sense of shock that the Court below was so indifferent to the possibility that it was being misused." (Brief for Appellants p. 60.)

In all the matters referred to above the appellants have made a specious attempt to assume the protective cloak of the privilege upon the basis of their own imaginative creation unsupported by competent evidence and unconnected with them. We proceed now to consideration of the law upon the facts actually disclosed by the record.

II.

**Clearly No Self-Incrimination Can Arise DIRECTLY
From Answers to the Questions Propounded.**

The sixteen questions beginning “Do you know * * *?” call for a “yes” or “no” answer. They do not call for an answer setting forth the basis for the “yes” answer if such be given. Merely to admit knowing the name, occupation, address or whereabouts of any person regardless of what the person’s affiliations may be cannot possibly be incriminatory.

The appellants apparently concede that the questions do not call for incriminatory answers, except to the extent that their offers of proof show the existence of alleged criminatory circumstances. For they state in their brief:

“Concededly the questions propounded to appellants do not on their face disclose the possible incriminatory nature of the answers.” (Brief for Appellants p. 13.)

How then have these appellants shown that *they* are in a position of danger by answering? Does any offer of proof made by them if proved show *them* to be in danger?

Does the indictment in New York of twelve members of the Communist Party of the United States on the charge generally of advocating the overthrow of the Government by force and violence show *these appellants* to be in danger?

Does the administrative determination by the Attorney General⁴ that the Communist Party is a subversive organization show any connection with *them* or show a danger to *them*.

Does the existence of an intention on the part of the Attorney General or of the United States Attorney to prosecute violators of the Smith Act show any connection with *these appellants* or show a danger to *them*?

The answer to each of these questions is clearly *no*. These witnesses are no more shown to be in danger than John Doe, or any person picked at random from any place. Indeed, if these witnesses are deemed to have made a showing of danger to *them*, then any witness chosen at random without regard to who he might be or what he might know, if asked these questions, could contend likewise that he was in danger and thus, on appellants' theory any witness could claim the privilege and refuse to testify.

⁴Fed. Reg., Vol. 13, No. 56, p. 1471.

III.

**There Has Been No Showing That Self-Incrimination
Will Result INDIRECTLY From Answers to the
Questions Propounded.**

To raise the privilege the *indirect* effect of answering the question must: have a *tangible* and *substantial probability* that the answer of the witness may help to *convict him of a crime*, *Ex parte Irvine*, 74 Fed. 954, 960; the danger must be *real* and *appreciable*, *Mason v. United States*, 244 U. S. 362, 366; any fact disclosed must be a *necessary* and *essential* part of a crime, *United States v. Burr*, *In re Willie*, 25 Fed. Cases No. 14, 692 e; the witness must, by answering, be placed in *pressing danger*, *United States v. Weisman*, 111 F. 2d 260.

The cases cited and relied upon by the appellants are clearly distinguishable and not in point:

A. *United States v. Zwillman*, 2 Cir., 108 F. 2d 802.

In this case the witness' showing included a statement in his behalf, in open Court by his attorney, that he had been in the liquor business up to 1933, when the 18th Amendment to the Constitution was repealed, at a time when such business activity obviously was a violation of Federal law. The Grand Jury inquiry was under 18 U. S. C. A., Sec. 88, which denounced conspiracies to commit any offense against the United States or to defraud the United States in any manner or for any purpose. The questions asked were as follows:

1. "Who were your business associates in 1928?"
2. Same questions as to 1929, 1930, 1931, and 1932.

Obviously in such a case, where the witness discloses an actual participation in a criminal business activity, as was

done in the *Zwillman* case, where the questions asked consist of an inquiry into business activities and where the Grand Jury inquiry was concerned with the very type of Federal crime involving such activities the witness has shown himself to be in peril. This case points up very distinctly the extent to which these appellants have failed to make a showing that *they* were in peril.

B. *United States v. Weisman*, 2 Cir., 111 F. 2d 260.

In this case the Grand Jury inquiry concerned the importation of narcotics from Shanghai, the witness had already answered some questions in connection therewith on several appearances before the Grand Jury, the prosecutor had announced that he would soon indict as a dealer in narcotics "the owner of a big advertising agency" who had been the "active partner of a big gangster" and who had been "in hiding for a month." The witness was in fact the head of an advertising agency, it had been rumored he had been the accomplice of a "gangster" and in fact he had gone to Florida under circumstances which suggested that he was trying to hide; the prosecution had questioned the witness' family about his business activities and had secured the books of his business. The questions asked were in substance:

- 1 Whether the witness had received any cables at Murray's Restaurant (copies of cables to this address, in code, from Shanghai being in possession of the prosecution);

2. Whether he knew anyone who visited, lived in, or stayed at Shanghai in the years 1934 to 1939?

Comment would appear to be unnecessary to point out the difference in peril to the witness Weisman, who was so closely described without being named, and to the ap-

pellants in the case at bar, who argue that they are in peril, but do not show it in the record. The cases are entirely distinguishable on this basis.

C. *United States v. Cusson*, 2 Cir., 132 F. 2d 413.

In this case the witness showed that two men named Groves were under indictment in the Southern District of New York, that they were both tried upon the indictment and that before the trial began the witness went to Mexico, stayed there while the trial was on and came back shortly after its conclusion. The witness had been asked by the prosecutor immediately before she appeared before the Grand Jury whether she had been subpoenaed to attend the trial. The question which was asked and the witness refused to answer was whether she had met any of the Groveses upon a visit to Philadelphia in February 1941, *shortly before the trial began*. She refused to answer on the ground that it might serve as a link in establishing that the Groveses had told her to go to Mexico so as to avoid being called as a witness and that this would tend to prove that she had conspired to obstruct justice.

In the *Cusson* case upon the showing made by the witness, all that was lacking to complete the necessary elements of the crime of conspiracy to obstruct justice was the very link which she declined to furnish, viz., that the Groveses had requested her to leave.

Again it appears obvious beyond any necessity of comment that the degree of peril to Cusson, based upon the showing made by her, was greater than anything shown by the appellants and particularly it was shown to be a peril to *her*, because it was indicated that the Grand Jury inquiry was being made of her. In the case at bar the Grand Jury inquiry was *not* concerned with appellants as each was advised.

D. *Counselman v. Hitchcock*, 142 U. S. 547.

In this case Counselman appeared before the Grand Jury and after having answered questions in which he identified himself as a dealer in interstate shipments of grain he was asked certain questions of which the following are in substance representative:

Q. Have you received for the transportation of your grain a rate less than the tariff or open rate?

Q. Have you received any rebate from the railroads on the transportation of grain whereby you received or secured transportation at less than tariff rates?

The Interstate Commerce Act, 24 Stat. 382, as amended by 25 Stat. 857, according to the provisions thereof in effect at that time made it a crime for any shipper to contract for or receive a rate less than the tariff or open rate.

It is obvious, therefore, that answers to the questions asked of Counselman would *directly* incriminate him, or as was stated by the Court in that case, at page 562:

“If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the act.”

It cannot be contended that any *direct* tendency to incriminate could result to the appellants from answers to the questions in the case at bar, and, indeed, as we have noted above, the appellants themselves do not contend that any danger of direct incrimination exists (see Brief of Appellants p. 13). The *Counselman* case in its holding is, therefore, clearly distinguishable from the case at bar. For further discussion on this case see Government's Brief in the *Alexander* case.

E. *United States v. Rosen*, 2 Cir., Case No. 209, October Term 1948, Decided April 25, 1949.

In this case the witness Rosen was asked several questions pertaining to his ownership of a certain Ford automobile, *a certificate of title of which was shown to him bearing his purported signature, signed before a notary*. The witness refused to answer the questions upon the ground of self-incrimination, was thereafter ordered to answer and refused.

The evidence upon Rosen's trial for contempt showed that the Ford automobile had allegedly been transferred at or about the date appearing on the certificate of title on which his signature appeared and that the transfer was made in connection with certain alleged illegal activities in espionage of one Alger Hiss. The Court of Appeals reversed the order adjudging the witness in contempt on the following grounds:

1. "He (Rosen) knew that the disposition by Hiss of this Ford car which he had used while engaged in such unlawful activities *had become a matter material to the investigation being conducted by the grand jury*." (P. 1239.)

2. "He (Rosen) knew, therefore, that there were peculiar and unusual circumstances regarding his purported connection with the car *and that the grand jury was seeking evidence to show just what they were and what they signified*." (Pp. 1239-1240.)

The showing made by Rosen, therefore, was that *he* was a subject of the Grand Jury investigation and had therefore, by his showing before the Court satisfied the burden upon him which the Court in the *Rosen* case described as follows:

“As they (the questions) do not on their face appear to call for answers which would tend to incriminate the appellant, it was incumbent upon him to justify his refusal to answer on the ground claimed by making it appear that his assertion that they would was based upon substantial reason so to believe *and was not made merely to protect some other person or persons*. Counselman v. Hitchcock, 142 U. S. 547; Brown v. Walker, 161 U. S. 591; Mason v. United States, 244 U. S. 362; United States v. Zwillman, 2 Cir., 108 F. 2d 802; United States v. Weisman, 2 Cir., 111 F. 2d 260; United States v. Cusson, 2 Cir., 132 F. 2d 413.” (Emphasis added.) *United States v. Rosen, supra*, at pages 1232-1233.

F. The Cases at Bar.

As indicated above under II, A and B, the so-called “appellants’ showing” does not in any way connect these appellants with any of the facts they offered to prove. The appellants have made no showing that *they* are involved. They have made no showing that there exists a threat of prosecution under the Smith Act or under any Federal Statute as to them. The *Zwillman, Weisman, Cusson, Counselman and Rosen* cases, *supra*, cited by appellants as supporting their position, all involve witnesses who showed that the peril was tangible, real, appreciable or pressing as to the witness *himself* and in fact that prosecution of the witness was likely to develop out of the activities of the very Grand Jury before which the questions were propounded.

These appellants have done nothing to connect themselves with a likelihood of prosecution under indictment by this Grand Jury or by any other. The Court below was satisfied that there existed no peril to these appellants in answering the questions. The Court below was satis-

fied that the appellants had failed to show a "reasonable probability that their answers would show or tend to show a violation of any law of the United States." See *Miller v. United States*, 9 Cir., 95 F. 2d 492, at 494.

In all cases where the questions have no *direct* tendency to incriminate there is an affirmative burden on the witness to make a showing to the Court that incrimination will probably result from answering. In cases where the witness contends that documents which he is ordered to produce will incriminate him he is required to submit the documents to the Court and show wherein they incriminate. See:

Correttjer v. Draughon, 1st Cir., 88 F. 2d 116;

Brown v. United States, 276 U. S. 134;

United States v. White, 322 U. S. 694.

In the case at bar the witnesses were afforded the opportunity of making their showing by private statement to the Court in chambers. They disclosed nothing in such statements. They not only failed to make a showing of indirect tendency to incriminate, they were unable to do so.

The Court, which afforded the witnesses their opportunities to show the existence of incriminatory peril was satisfied that none existed. Its determination is supported by the evidence and as was stated by the Court of Appeals in the *Mason* case, 244 U. S. 362, at page 366:

"Ordinarily, he (the court) is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere."

IV.

No Basis Exists for a Claim of Privilege Against Self-Incrimination for Conspiracy to Obstruct the Administration of Justice.

The assertion of a privilege against self-incrimination for conspiracy to obstruct the administration of justice was not made by the appellants below, but was and is merely an argument of counsel, conceived after the witnesses had refused to testify, and not even present in the minds of the witnesses at the time of their refusals. No such claim was made by any witness in his private statement to the Court, despite the notably meticulous and uniform language of each witness in referring to fear of prosecution under the Smith Act [Doran, R. 380-383; Bock, R. 396-400; Kasinowitz, R. 435-436; Steinberg, R. 441-442; Dobbs, R. 427-429].

The novel and ingenious nature of such an argument, and yet its falsity, appears from the fact that witnesses to be called for any and all Grand Jury inquiries could by such a scheme entirely defeat the purposes of the constitutionally created body known as the Grand Jury, but only by placing upon the Constitution a construction such as Chief Justice Marshall had in mind when he stated in *Gibbons v. Ogden*, 22 U. S. 1 at p. 220:

“Powerful and ingenious minds * * * may, by a course of well-digested, but refined and metaphysical reasoning * * * explain away the Constitution of our country and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.”

V.

The Questions Propounded Did Not Compel Disclosure by Appellants of Political Opinion or Association Nor Did They Violate Any Rights of Appellants Under the First Amendment to the Constitution of the United States.

It is apparent from reading the Record that the Grand Jury was disinterested in the political affiliation of the appellants. The questions pertained to appellants' knowledge of matters which were preliminary to ascertainment of facts concerning Federal employees who were the subject of the Grand Jury inquiry. The extent that the questions may have touched upon the matter of a political party was entirely incidental.

The First Amendment to the Constitution of the United States grants the freedoms of religion, speech and the press, and cloaks an individual with the protection necessary to preserve those principles.

However, even if the questions had called for a disclosure of political affiliation, it is a matter of common knowledge that political affiliation is not a matter of secret. Also it is a matter of common knowledge that a requisite to the casting of a vote at a primary election carries with it the necessity of declaring a person's party affiliation by registration with the proper authorities. This is illustrated by the Court in *Barsky v. United States*, 167 F. 2d 241, a case decided by the Court of Appeals for the District of Columbia where it is stated at page 249:

“* * * The right of a qualified citizen to vote as he pleases is certainly a fundamental right and is a

basic concept in our system of government. Public voting subjected even the most hardy to pressure and also to violence. But it was never thought, or suggested, that public voting violated constitutional rights. The secret ballot does not seem to have appeared in this country until February 1888, when the newly-devised Australian system was adopted for municipal elections in Louisville, Kentucky. On this subject see Wigmore's *Australian Ballot System* (cf. 8 Wigmore, *Evidence* (3d ed. 1940), Sec. 2214, p. 163)."

Even a direct question, which was not here involved, whether one is a member of the Communist Party would be no more an infringement of an individual's right under the First Amendment of the Constitution of the United States than an inquiry of whether or not the person is a member of the Democratic, Republican or Socialist Party. Were it not possible to ascertain an individual's political affiliation, the ability to investigate election frauds would be, not only curtailed, but made practically impossible.

People have the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect to their personal and private affairs. The question in each case, therefore, must be whether the inquiries are arbitrary or unreasonable. The right to remain silent does not apply where essential operations of Government may require disclosures "for the preservation of an orderly society—as in the case of compulsion to give evidence in court" *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 645.

Our courts have established that it is not a violation of an individual's constitutional rights to be asked to reveal his connection with a particular party.

In *Abrams v. United States*, 2 Cir., 64 F. 2d 22, a Democrat was tried in contempt proceedings because of his refusal before a Federal grand jury to disclose his connections with the Democratic Party. In this case, at page 23, it is stated:

“The appellant was subpoenaed to appear as a witness before a federal grand jury in the Southern district of New York in the course of its investigation of alleged election frauds in violation of 18 U. S. C. §51 (18 U. S. C. A. §51). He appeared, and, while being examined, was asked certain questions which he refused to answer on the ground that his answers might tend to incriminate him. He was then taken before a District Judge; a hearing was had at which he was represented by counsel; he was directed to answer certain of the questions, and given an opportunity to appear again before the grand jury to do so. Upon his refusal to do so, he was adjudged in contempt and sentenced to a term of imprisonment with the privilege of purging himself within five days by answering as directed.

The appellant, when he appeared before the grand jury, gave his name and residence. The following then occurred:

‘Q. Live anywhere else? A. Yes, sir.

Q. Where? A. I do not think I will answer that.

Q. Well, if you have in mind a possible prosecution for registering from the wrong address, I can assure you now that we have not any such thing in mind. In any event, we have no jurisdiction of it. Registering from the wrong address is not a Federal

crime, and therefore is no immunity against answering that question. A. Well, I still refuse to answer.'

After testifying as to his occupation, the examination continued:

'Q. Are you the Democratic captain of the Fourth Election District of the Fourth Assembly District in New York County? A. I do not think I will answer that.

Q. On what ground do you decline to answer that? A. Well, standing on my constitutional rights. It may tend to incriminate me.

Q. Where was the polling place of the Fourth Election District of the Fourth Assembly District at the last election? A. I refuse to answer that.

Q. On what ground? A. Same grounds.

Q. You mean that it might tend to incriminate you? A. Yes.

Q. Were you present at the polling place? A. I refuse to answer.'"

The witness was found guilty of contempt which was affirmed on appeal, the Court stating, at page 29:

"It was surely not a violation of law either to be or not to be the Democratic caption of the election district concerning which inquiry was made; nor to know, or not to know, the location at the then last election of the polling place in that district; nor to have been, or not to have been, present at that polling place at the then last election; nor to have been, or not to have been acquainted with the persons who acted as inspectors in that district at the then last election; nor to have made, or not to have made, to a district leader a report of the result of the vote then

and there cast; nor to have been present, or not to have been present, at any other polling place on that day. * * *” See also *Blair v. United States*, 250 U. S. 273 and *Correttjer v. Draughon*, 1 Cir. 88 F. 2d 116.

In the case of *Barsky v. United States*, *supra*, which is cited and discussed in our brief in the *Alexander* case (p. 23 ff) the Court states at page 244:

“We think that even if the inquiry here had been such as to elicit the answer that the witness was a believer in Communism or a member of the Communist Party, Congress had power to make the inquiry.”
(Italics supplied.)

To limit the function of the Grand Jury as urged by appellants in this matter would not be a protection of the private rights but would destroy the private rights because of the inability of society to protect itself. In the *Barsky* case at page 249, the Court said:

“* * * That the protection of private rights upon occasion involves an invasion of these rights is in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer. That invasion should never occur except upon necessity, but unless democratic government (by which we mean government premised upon individual human rights) can protect itself by means commensurate with danger, it is doomed. That it cannot do so is the hope of its opponents, the query of its skeptics, the fear of its supporters. * * *.”

VI.

The Appellants Have No Standing to Challenge the Composition and Selection of the Grand Jury.

We deem no answer necessary to appellants' contention that the Court below erred in refusing to take evidence challenging the composition of the Grand Jury, other than to cite the case of *Blair v. United States*, 250 U. S. 273, in which witnesses before a Grand Jury were found in contempt of court for refusal to answer questions pertaining to political activity despite their contention that the Grand Jury was without constitutional authority to conduct the inquiry.

Upon writ of error the Supreme Court affirmed, stating at page 282:

“He (the witness) is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. *Nelson v. United States*, 201 U. S. 92, 115.

“On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization.

“He is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. *Hale v. Henkel*, 201 U. S. 43, 65. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by ques-

tions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks v. United States*, 223 U. S. 178, 184."

VII.

The Interests of Justice and the Maintenance of an Orderly Society Require Affirmance of the Judgments and Orders.

There is necessarily presented in this case the problem of weighing the conflicting interests on the one hand of society as a whole, and on the other of the individual. The problem is inherent in cases of this sort. In the case of *Barsky v. United States*, 167 F. 2d 241, in which the Court of Appeals for the District of Columbia affirmed a conviction for wilful failure to produce records before a committee of Congress (the refusal being on the ground that disclosure of membership in the Communist Party might result), the Court stated at page 244:

"The problem thus presented is difficult and delicate. In it we have not only the frequent '*real problem of balancing the public interest against private security*,' but in this instance we must do so in the midst of swirling currents of public emotion in both directions."

Further, in the same case, at page 249, as we have previously in this brief quoted, the Court states:

"* * * That the protection of private rights upon occasion involves an invasion of those rights is

in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer.”

In the case at bar the public interest is represented by the grand jury, which finds its creation in the Fifth Amendment to the Constitution of the United States, the same Amendment which provides for those other bulwarks of civil liberties, prohibitions against double jeopardy and compulsory testimony against oneself in a criminal case as well as the guarantee of due process of law. The grand jury is an institution designed to protect the *individual*.

“It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of *Jones v. Robbins*, 8 Gray, 329, ‘individual citizens’ ‘from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury;’ and ‘in case of high offenses’ it ‘is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions.’ ”

Ex parte Bain, 121 U. S. 1 at p. 12.

If the grand jury is to continue to function for the protection of the individual it must be able to function effectively. Its effectiveness depends almost entirely upon its ability, through the processes of the court to compel

attendance and testimony before it. These appellants, while paying lip service to the maintenance of civil liberties, contend for a rule which would enable a witness before a grand jury to decide for himself whether to testify, thus in effect destroying the institution of the grand jury.

That it may be inconvenient or even distasteful to be under subpoena and required to testify cannot be denied. But such is the price, in small part, which must be paid by the citizens of an orderly society. Indeed, being subject to the contempt power of the court is also part of that price, as was said by the Court in *Doyle v. London Guarantee Co.*, 204 U. S. 599, at page 607:

"But the power to punish for contempt is inherent in the authority of courts, and is necessary to the administration of justice and part of the inconvenience to which a citizen is subject in a community governed by law regulated by orderly judicial procedure."
(Emphasis supplied.)

Particularly should the champion of civil liberties be aware of the necessity of maintaining the instrumentalities of an organized society, including the grand jury, for without the effective machinery of government such liberties are idle concepts and meaningless prattle:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. * * *"

Cox v. New Hampshire, 312 U. S. 569, at page 574.

In the case at bar there must be considered the necessity of maintaining the grand jury as an effective instrumentality of Government. In this case the grand jury is attempting to accomplish its high constitutional purposes. It is being obstructed by the appellants, who contend that their constitutional rights are being violated by a prosecutor guilty of "hypocrisy" and "tyranny." The Government contends, on the contrary, that the Constitution is being upheld and protected against witnesses who are perverting a constitutional privilege and are remiss in their refusal to accept the responsibilities of citizenship:

"Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege." (Emphasis added.)
Brown v. Walker, 161 U. S. 591, at page 600.

There is presented in this case not so much the necessity of balancing conflicting interests, but rather of evaluating each so that each may be revealed in its true light. The spurious assertion of a constitutional privilege is an interest which needs no protection.

"Invocation of constitutional liberties as part of the strategy for overthrowing them presents a dilemma to a free people which may not be soluble by constitutional logic alone."

Terminiello v. Chicago, Supreme Court of the United States, Case No. 272—October Term, 1948, decided May 16, 1949, Jackson, J., dissenting, at page 24.

Conclusion.

Reference is made again to the Government's brief filed in the *Alexander* case. At the outset of this brief it was stated that the *Alexander* case brief was adopted herein in support of the Government's position. We submit that entire brief upon the questions of law here involved and as setting forth the law applicable and controlling on the issues herein presented. The Conclusion therein presented applies here and is adopted. We disregard the charges, among others, of hypocrisy and tyranny made by the appellants against Government counsel. We deem the record clear to the effect that these appellants are mere witnesses called for the sole purpose of giving evidence as to others. We submit that they are entitled to the same privileges and are subject to the same obligations as any other witness and to no others. They cannot by the spurious assertion of a privilege be permitted to protect others and thereby defeat the functioning of the grand jury.

The Judgments and Orders as to all appellants in both cases should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

ROBERT J. KELLEHER,
Assistant United States Attorney,

MAX H. GOLDSCHNID,
Special Assistant to the Attorney General,
Attorneys for Appellee.

Nos. 12217 and 12221.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12217

SAMUEL HARRY KASINOWITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and CONSOLIDATED CASES.

No. 12221

LILLIAN ADELE DORAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and CONSOLIDATED CASES.

REPLY BRIEF FOR APPELLANTS.

MARGOLIS AND McTERNAN,

BEN MARGOLIS,

JOHN T. McTERNAN,

709 Rives-Strong Building, Los Angeles 15,

Attorneys for Appellants.

WILLIAM B. MURRISH,

JOHN W. PORTER,

ESTHER SHANDLER,

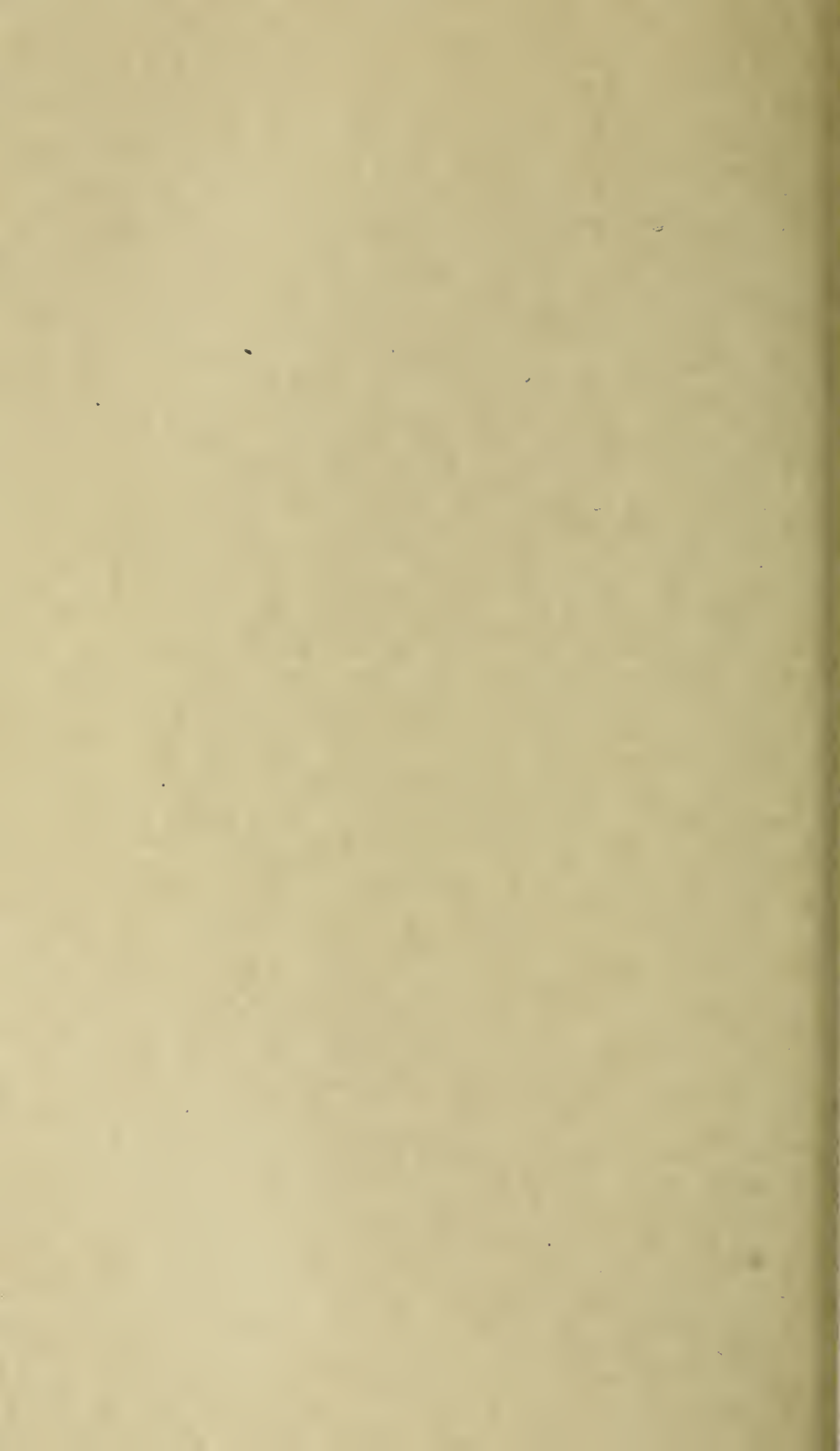
JACK TENNER,

Of Counsel.

FILED

JUN 25 1949

PAUL P. O'BRIEN,



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REPLY BRIEF FOR APPELLANTS.

Introduction.

Appellants file herewith their brief in reply to the brief for appellee. Under the terms of the order of this court entered upon the stipulation of the parties this brief was due seven days from receipt by appellants' counsel of a

typewritten copy of appellee's brief, or, on June 14, 1949. By order, on application of appellants' counsel, this time was extended to and including June 21, 1949.

In accordance with the stipulation of the parties approved by the court the causes are to stand submitted upon the filing of this brief, without oral argument unless the same be directed by this court.

As the brief was being printed counsels' attention was for the first time directed to a recent decision of the United States Supreme Court in *Smith v. U. S.*, No. 292, Oct. Term, decided May 31, 1949 (17 L. W. 4448), which, they submit, decisively supports appellants and disposes of the government's contentions on this appeal. It is discussed, *infra*, pages 5 to 7. The court's attention is urgently invited to this opinion.

I.

It Is the Purpose of the Privilege Against Self-Incrimination to Protect Witnesses Against Compelled Disclosures That Would Expose Them to Prosecution by Virtue of the Danger That the Fact Disclosed Might Constitute Part of the Chain of Proof of a Crime or Lead to the Discovery of Such Proof. Its Protection Is Not Restricted to Compelled Disclosures That Might "Complete a Chain of Proof Necessary to Convict" or That Might Constitute "a Necessary and Essential Part of a Crime." (Appellee's Brief p. 17; Appellee's Brief, Alexander, p. 12.),

The government's position is that a witness may claim his privilege against self-incrimination only against disclosure of a fact "which may complete the chain of evidence necessary to convict him or which is a necessary and essential part of a crime." (See Appellee's Brief p. 17; Appellee's Brief, Alexander, p. 12.) In effect the government urges that the privilege is available only when it serves to shield an answer that would bring about a *conviction* of crime.

The authorities on the other hand hold that it is the function of the privilege to protect a witness from giving answers that expose him to criminal prosecution, irrespective of whether such a prosecution will or might result in conviction:

"The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony *which may expose him to prosecution for crime*. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or

even tend to disgrace him; *but the line is drawn at testimony that may expose him to prosecution.*" (Emphasis added.) *Hale v. Henkel*, 201 U. S. 43, 66, 50 L. Ed. 652, 662.

If the test were that the disclosure could be used to convict then the privilege would be satisfied by an immunity statute which prevented use of the testimony against the witness in any criminal case. For then the testimony could not become part of the "chain of evidence necessary to convict." But this was rejected at least as early as *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110. In that case the immunity statute provided that the witness' answers could not "be given in evidence or in any manner used against" him in any criminal case (142 U. S. p. 560, 35 L. Ed. p. 1113). But the court held that this was not enough because it did not protect the witness from the risk of prosecution resulting from the use of his answers "to search out other testimony to be used in evidence against him or his property in a criminal proceeding" (142 U. S. p. 564, 35 L. Ed. p. 1114). The privilege, the court reasoned, protects witnesses from exposure to prosecution resulting from their answers. This protection extends not simply to admissions of guilt of or an element of the crime but to the disclosure of any fact which can be linked with other facts to prove guilt or used in the discovery of such facts. Since the privilege gives this protection it can be replaced only by an immunity statute which gives the same protection:

"We are clearly of the opinion that no statute which leaves the party or witness *subject to prosecution after he answers the criminating questions* put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statu-

tory enactment, to be valid must afford *absolute immunity against future prosecution* for the offense to which the question relates. In this respect we give our assent . . . to the doctrine of Emery's Case.* . . ." (Emphasis added.) 142 U. S. pp. 585-6, 35 L. Ed. p. 1122.

This principle was fully approved and re-asserted in *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819. It was not qualified or restricted in the manner the government suggests (Appellee's Brief, Alexander, p. 12). Rather the court set forth the portion of the *Counselman* opinion quoted just above and concluded, "The inference from this language is that if the statute does afford *such immunity against future prosecution*, the witness will be compellable to testify." (Emphasis added.) (161 U. S. p. 594, 40 L. Ed. p. 820.) Then, finding that the immunity statute before it "fully accomplished" this "object" of the privilege, the statute was upheld and the witness coerced to answer (161 U. S. p. 610, 40 L. Ed. p. 825).

The law of *Counselman v. Hitchcock*, *supra*, and *Brown v. Walker*, *supra*, has been fully approved and applied by the United States Supreme Court, in a unanimous opinion, only within the last few weeks, *Smith v. United States*, No. 292, October Term 1948, decided May 31, 1949, 17 L. W. 4448. Because of the controlling im-

*It is this very doctrine which the government attacks, claiming that it affords "no definite guide for lower courts" (Appellee's Brief, Alexander, p. 11). On the contrary the principle establishes a complete guide which has been repeatedly applied. *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819; *Arndstein v. McCarthy*, 254 U. S. 71, 65 L. Ed. 138; *Ex Parte Irvine*, 74 Fed. 954; *United States v. Rosen*, 2 Cir., F. 2d, No. 209—October Term 1948, dec. April 25, 1949; *Smith v. United States*, U. S. S. Ct. No. 292—October Term, 1948, dec. May 31, 1949.

portance of this decision upon the case at bar we discuss it here at some length. In the *Smith* case the defendant had been convicted of violations of the Emergency Price Control Act and the Second War Powers Act. Prior to his prosecution he had been compelled to testify at an examination under the Price Control Act before an examiner of the OPA. In that proceeding he testified concerning "the organization of his business, his use of priorities, his suppliers and customers, his banking connections and the method of computing the selling price of surplus materials" (17 L. W. 4451). The Price Control Act contained an immunity provision similar to that in *Brown v. Walker, supra*, but conditioned upon the witness' claim of privilege. Smith claimed his privilege and then testified as indicated. Thereafter informations were returned against him alleging violations of the Second War Powers Act and the priority regulations thereunder and an indictment was brought for conspiracy to sell finished piece goods in excess of prices fixed under the Price Control Act. By motion to dismiss Smith claimed that he had immunity against such prosecution by reason of his testimony before the OPA examiner. The Supreme Court upheld his position.

In so holding the Supreme Court squarely rejected the position advanced by the government here and with equal directness approved the position urged by appellants. At the outset it should be observed that in the court's discussion it equates Smith's claim of immunity to a claim of the privilege because under the *Counselman* and *Brown* cases, *supra*, they were coextensive—the more so in the *Smith* case because the statute provided that immunity would attach only where the witness first claimed his privilege. Smith's claim of immunity had been rejected in the

trial court because "the testimony [*i. e.*, before the OPA examiner] does not prove any part or feature of the commission of a crime, nor will it tend to a conviction when combined with proof of other circumstances which others may supply."* This, the Supreme Court held was not the test. The true test was held to be that laid down in *Counselman v. Hitchcock*:

" . . . Through *Counselman v. Hitchcock*, 142 U. S. 547, it was established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of privilege against self-incrimination. To meet that requirement Congress amended the immunity provisions of the Interstate Commerce Act, 24 Stat. 383, Sec. 12, that protected a witness from use against him of evidence so given in any subsequent criminal proceeding so as to provide that the witness should not be 'prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify . . . P. 4, *supra*. This remission of responsibility for criminal acts met the 'absolute' test if the constitutional provision against self-incrimination. *Brown v. Walker*, 161 U. S. 591. If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself."—17 L. W. 4451.

Thus, has the Supreme Court with finality laid to rest the government's contention here. The immunity statute to be valid must be coextensive with the privilege.

*This the *verbatim* ruling of the trial court set forth in the Supreme Court's opinion (17 L. W. 4451).

That is, it must protect a witness from exposure to prosecution with respect to "any transaction, matter or thing, concerning which he may testify" to incriminating disclosures. Only in this way can the witness be protected from being, in the words of the Constitution, "a witness against himself." Therefore, as the court holds, the privilege itself affords the witness protection against giving answers which may expose him to prosecution. It is the risk of prosecution against which the privilege protects, not as the government asserts, the giving of proof necessary to convict.

But the court went further. Laying down this ruling, it followed the *Counselman* opinion in adopting the "doctrine of Emery's Case." It held that answers which expose to prosecution are answers which might disclose a fact which could constitute a link in the probative chain or provide leads to the discovery of such evidence. After setting out Smith's testimony, or its substance, the court held that he had obtained his immunity, because

" . . . The facts brought out in his examination are not facts disassociated from his prosecution as in *Heike v. United States*, 227 U. S. 131, but in the language of the Compulsory Testimony Act are pertinent to the prosecution and 'concerning which' petitioner testified. The facts were links in the chain of evidence."—17 L. W. 4451-2.

The government contended that Smith did not have immunity so far as the indictment for conspiracy to violate the Price Control Act was concerned since his answers were "exculpatory" in that they denied violation of that act and gave facts consistent with such a denial. But Smith's answers had also given considerable information with respect to the concerns with which he had dealt,

his manner of dealing, his banker, etc. While his testimony contained no admission of a crime or, in the government's words here, no disclosure of a "necessary and essential part of a crime," it did fall within the privilege and therefore within the immunity statute because it could have furnished leads to the discovery of proof of the crime. For this reason the court found it unnecessary to determine whether exculpatory testimony would invoke the statutory immunity:

" . . . Certainly many of these disclosures furnished leads that could have uncovered evidence of the unlawful conspiracy charged in the indictment."
—17 L. W. 4453.

Nor do the authorities cited by the government support its position. The government does not, because it can not, derive sustenance from the actual holding in *Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954.* There the claim of privilege was asserted to questions propounded to witnesses in the course of a criminal trial calling for their knowledge of the business activities of the defendants. It had already been testified that the defendants were participants in a gambling ring operating in two states and that the witness had frequently carried "matter" between the defendants' offices. The claim of privilege was upheld on the grounds that the witnesses' admission of knowledge of the business activities of the defendants could be used to show that the defendants were engaged in gambling activities, and this, together with the testimony that the witnesses had carried "matter" between the defendants' offices, "would seem to be a circumstance of the greatest evidential importance in proving the complicity of the wit-

*Cited in Appellee's Brief, Alexander, page 12, *et seq.*

nesses in violations of the interstate commerce regulations . . . to show that the places between which they were constantly carrying matter were places where matter of the forbidden character would be needed and used" (*id.* p. 963). The same immunity statute as that involved in the *Counselman* case would have prevented these answers from being used to convict. But because the answers would leave the witness "subject to prosecution after he answers the criminating question" the claim of privilege was upheld. The *Irvine* case is a square rejection of the government's contention that the privilege protects only when the answer supplies facts "necessary to convict."

But the government would hide the holding of the *Irvine* case behind certain language excerpted from the court's opinion therein. (See Appellee's Brief, Alexander, pp. 12-3.) The court observes that the privilege will not protect disclosures which would be incriminating only "upon some imaginary hypothesis." Or, to use the words of Wharton which the court quotes, the privilege does not extend to an answer which might "become part of a supposeable concatenation of incidents from which criminality might be inferred." At best these were general observations which did not govern the actual decision of the case. They simply formulate the requirement that the claim of privilege be supported by facts showing a reasonable likelihood of danger to the witness. Obviously the witness may not rely on sheer speculation where fertility of imagination replaces facts and reason. Indeed, read in its entirety this passage supports the position of appellants and rejects the government's. For in it the court states that the danger to the witness must be determined upon the nature of the question and the "facts adduced" in support of the privilege and the danger exists when (in words of Wharton approved by the court),

“there is reasonable ground to apprehend that, should he answer, he would be *exposed to a criminal prosecution*” (emphasis added) (*id.* p. 960).

The reasoning of Judge Taft in the passage from the *Irvine* case just discussed provides the key to a proper evaluation of *Mason v. United States*, 244 U. S. 362, 61 L. Ed. 1198, and *Regina v. Boyes*, 1 Best and S. 311. In the *Mason* case the court had before it no facts to show the “setting” of the questions and their incriminatory effect. It had to determine the claim of privilege on the face of the questions alone. Since card playing of itself was not a crime under the statute it held that an admission of seeing a game of cards being played would not have been incriminating. The absence of facts indicating the danger to the witness left simply an “imaginary hypothesis” or a “supposeable concatenation of incidents” to support the witnesses’ claims. The privilege does not operate abstractly but only concretely in the actual situation of the witness at the time the question is asked. The court was provided with no facts by which it could perceive a reasonable possibility of exposure to prosecution.

Regina v. Boyes, *supra*, is a classic example of the “imaginary hypothesis” which the courts reject. There the witness claimed his privilege notwithstanding a grant of immunity by asserting that it did not protect him from impeachment by Parliament. He did not show that he was a member of that body or a candidate for election thereto or any other reasonable foreseeability that he would ever become a member of that body. These facts negative any tangible possibility of exposure to prosecution leading to his impeachment by his answer, and the privilege would not lie.

Both the *Mason* and the *Boyes* cases therefore present a question not involved here—*viz.*, whether the claim of privilege must be observed simply because a witness claims it. The court in each case laid down the rule that it is for the court to determine the validity of the claim on the nature of the question and the facts adduced by the witness. Appellants of course concede this to be the law. They have proceeded on this basis and have made their showing of the danger to them. Their case differs from the *Mason* and *Boyes* cases because their showing indicates that appellants have a rational basis for fearing danger of prosecution if they are forced to answer questions disclosing association with the Communist Party. Having shown this, they have established their right to claim the privilege.

The excerpt from Wigmore (Appellee's Brief, Alexander, p. 16) goes to the same point.*

In the instant case the court is not faced with the "imaginary hypothesis" situation found in the *Mason* and

*Additionally it should be noted that the *holding* in the *Willie* case (25 Fed. Cas. 38) is not limited in the manner indicated by Dean Wigmore in the excerpt quoted by the government. Chief Justice Marshall *held* that the witness had no privilege not to disclose present knowledge of the cypher because present knowledge would not "justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact" (emphasis added) (25 Fed. Cas. p. 40). In the same passage the Chief Justice refers to the possibility of the answer "implicating the witness." Earlier in the opinion he states that it is the function of the privilege to protect a witness from disclosing a single fact of itself "unavailing" but which together with others would provide the means whereby the witness would be "exposed to a prosecution." "The rule which declares that no man is compellable to *accuse* himself would most obviously be infringed by compelling a witness to disclose a fact of this description" (25 Fed. Cas. p. 40). The *Willie* case rests upon the same concept of the privilege as the *Counselman* case and supports appellants, not the government, in the case at bar.

Boyes cases, *supra*. On the contrary there are before it facts from which a rational, factual hypothesis of exposure to prosecution is inescapably present. Appellants showing below was that there is a statute making it a crime to advocate the overthrow of the government by force and violence, to belong to an organization that so advocates, to be affiliated with such an organization, to abet such an organization, to help form or organize it, or to conspire to do any of these things; that the responsible law enforcement officers of the federal government have determined the Communist Party to be such an organization and have instituted prosecutions against its national leaders for conspiring to form it and for being members of it; that it has been "reported from an apparently responsible source" [R. 305] that the Department of Justice was, at the time appellants were interrogated, about to launch a nationwide drive of prosecutions against members of the Communist Party under the Smith Act and had convened federal grand juries in Los Angeles and elsewhere to this end; that the press carried statements attributing, in direct quotes, to the prosecutor handling this inquiry the statement that this grand jury had summoned these appellants for an investigation leading to prosecution of members of the Communist Party in Los Angeles; that answers to the questions put to appellants would disclose such knowledge of the inner relationships and activities of the Communist Party as to constitute a link in the chain of proof of membership in it or affiliation with it or abetting it, or the means of discovering such proof. This showing indicates a real and pressing danger of prosecution which the government can not deny. Indeed it has made no effort to deny the effect of appellants' showing but rather contents itself with pressing upon this court arguments concerning the scope

of the privilege which were rejected as early as *In re Willie, supra*.

One further consideration shows the error of the government's position. If the privilege could be claimed only when the disclosure demanded of the witness might be such as to "complete the chain of evidence necessary to convict" it would be his burden to support his claim of privilege by showing that all other proof of the crime exists and is available to the prosecutor and that his answer would in effect supply the missing link. Were this the law the privilege would be utterly worthless. These cases most frequently arise out of grand jury investigations. Under these circumstances the grand jury record is secret and the information which the prosecutor has developed through investigation is confidential information.* The witness would therefore be unable to sustain the burden cast upon him for unless he could show the evidence available to the government he could not begin to show that only his answer was lacking from an otherwise completed line of proof. But the claim of privilege also arises in non-criminal tribunals such as immigration hearings, bankruptcy proceedings or civil trials. Under these circumstances the disclosures called for may never have been involved in any criminal in-

*That this comports with the facts may be seen from the record here when appellants sought to show the basis of their fear of prosecution by questioning the prosecutor. All questions seeking to elicit the facts on the grand jury record or in the possession of the prosecutor were met with the objection that they called for "confidential" or "secret" information. These objections were uniformly sustained [R. 252-283, *passim*.].

vestigation. It would be impossible to show that a prosecutor had developed a completed line of proof but for the fact contained in the witness' answer because this had never been undertaken. Again the privilege would be worthless if the government's position were the law. The same can be said of testimony before legislative committees.

Furthermore this construction of the privilege would require a witness to present all of the testimony against himself, except a single missing link, as a condition of refusing to testify against himself. The privilege against self-incrimination would become the means whereby the government would compel a witness to prove the case against himself. Then, indeed, would the privilege be destroyed for the witness would be "forced to disclose those very facts which the privilege protects" (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262).

These considerations impel, we submit, a rejection of the government's position. The only test can be whether the facts which the witness might disclose can, under the circumstances he establishes be coupled with other facts to create a danger of prosecution. If the government's position were adopted the availability of the privilege would turn on the extent to which a prosecutor had already prepared a case against him and the witness' ability to prove his own guilt. The cases show that it is the purpose of the privilege to protect the witness from disclosing facts which might reasonably create a risk that a prosecutor would undertake to prepare a prosecution.

II.

Appellants' Showing Established a Reasonable Likelihood of Danger to Them Personally. Their Showing Consisted of Evidence Which Was Competent to Show This Danger and the Reasonableness of Their Fear of Crimination; It Cannot Be Dismissed as "Offers to Prove" and "Hearsay Evidence." (See Appellee's Brief pp. 11-12.)

(a) Appellants' Showing Consisted of Competent Evidence, and All of It Was Admissible Under the Cases to Show the Reasonableness of Appellants' Fear of Crimination.

Appellants' showing (see the summaries thereof in Appellants' Opening Brief, pp. 14-26, 39-42) consisted of uncontradicted evidence that the grand jury was investigating the Communist Party. The very questions put to appellants show this.* The prosecutor admitted that he was trying to establish before the grand jury the whereabouts of the membership list and that he subpoenaed and interrogated appellants because he had reason to believe he could obtain from them this information [R. 287, 280-1]. This evidence shows that the prosecutor had information that the appellants were so connected with the Communist Party as to be able to disclose the whereabouts of the membership records. Answers to the questions therefore might well provide the link necessary to establish membership or affiliation within the meaning of the Smith Act.

*See, *e. g.*, the questions concerning names of officers of the Communist Party, table of organization of the Communist Party, who in the Communist Party is in charge of membership or membership rolls (Appellants' Opening Brief, Appendix A-2).

Appellants offered competent, admissible evidence that the Communist Party, with which the questions would have linked appellants, was deemed by the government to be an organization in violation of the Smith Act. The offer consisted of duly certified copies of indictments returned in the United States District Court for the Southern District of New York charging the members of the national committee of the Communist Party [*cf.* R. 291] with two crimes:

(1) a conspiracy "to organize as the Communist Party of the United States of America a society . . . of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" [Ex. A, R. 327-8]; and

(2) mere membership in that party [Ex. B, R. 331].*

This evidence was rejected as immaterial. It was clearly material and should have been received. This court may regard it as having been admitted. (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262).

The record further discloses that the prosecutor and the grand jury actually directed this inquiry into possible violations of the Smith Act. Appellants Blair, Brodsky, Caress and Spector were asked whether they knew of any person in Los Angeles County who advocated the overthrow of the government of the United States by force and violence and whether they knew of any organization in Los Angeles County that had that purpose. (See

*Apparently the government now admits that the Attorney General has found that the Communist Party advocates overthrow of the government by force and violence (Appellee's Brief p. 16).

Appellants' Opening Brief, App. A-2, Questions 14 and 15.) In addition, appellants offered much evidence to show a reasonable basis for their fear that the inquiry before which they were called was in fact conducted to obtain information upon which indictments under the Smith Act could be obtained against Communist Party members or affiliates similar to those returned in New York. While this showing is summarized in Appellants' Opening Brief (pp. 18-26) it will be well to recall here that it included this: newspaper reports that the Department of Justice had launched a nationwide drive against the Communist Party and its members under the Smith Act; that it had announced the impanelling of federal grand juries in Los Angeles and other cities to this end; that the prosecutors involved in the inquiry before which appellants were called made public statements that the inquiry was the "opening gun" in an investigation of "Communist groups and activities" and "subversive and disloyal groups." [See R. 302, 304, 166-180; Ex. D, Idf. R. 335-6; Ex. E, Idf. R. 337; R. 308; Ex. I, Idf. R. 305-6; all of this is summarized in Appellants' Opening Brief pp. 18-26.]

While the last mentioned items of evidence were newspaper articles and are therefore not competent evidence of the facts therein stated, they are competent to show the information available to appellants and the reasonableness of their fear of prosecution. This kind of proof has been specifically approved by the Second Circuit for purposes of showing the genuineness of the peril (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262). Moreover here the newspaper articles, in the main, purport to be straight reporting and claim authoritativeness from high sources in the Department of Justice or actually

quote the prosecutor handling the very inquiry before which appellants were summoned. They rise above the "irresponsible gossip" held competent to show the danger of prosecution in the *Weisman* case, *supra*, page 262.

(b) Appellants' Showing, Contrary to the Government's Contentions (Appellee's Brief pp. 15-16) Indicates a Genuine and Reasonable Likelihood of Peril to Them Individually.

The government, with more temerity than reason, asserts that appellants are, in effect, witnesses "chosen at random without regard to who . . . [they] . . . might be or what . . . [they] . . . might know" (Appellee's Brief p. 16). This assertion flies in the very teeth of Mr. Carter's sworn testimony that he selected these appellants for interrogation because he had reason to believe they could give him information as to the "whereabouts of the Los Angeles County Communist Party membership records" [R. 280-1]. Appellants were not chosen at random. No prosecutor would endeavor to find out how to locate the membership records of an organization through witnesses "picked at random from any place" (Appellee's Brief p. 16). He would select people who are part of the organization, people who hold positions of sufficient responsibility in the organization to be able to tell him where the records could be found. It is an inescapable inference from Mr. Carter's testimony, viewed in the light of what one would expect from a reasonable man in his position, that he selected appellants for subpoena and interrogation because he had information not only that they were members of the Communist Party but that they held such positions in it that they knew who kept the membership records and where they

were. To infer less would force one to the conclusion that Mr. Carter would attempt to locate the Communist Party membership records by a random selection of citizens in the community, persisted in, perhaps, until every resident had been questioned.

It is therefore plain that appellants' showing indicated their possible connection with the Communist Party, and the extent to which answers to the prosecutor's questions would establish this connection, as a matter of fact, out of their own mouths. In their opening brief herein (pp. 27-38) appellants set forth the manner in which their answers to the question put to them might provide evidence of their connection with the Communist Party or the means of discovering it. To none of this has the government ventured an answer.

Still, the government disingenuously asks, where is the danger of prosecution? To this we say that if the Attorney General will prosecute citizens in New York for mere membership in the Communist Party [see Ex. B, R. 331] he may very well do the same in Los Angeles. Indeed, the newspapers indicated that this was definitely projected [Ex. D, Idf. R. 335-6; Ex. E, Idf. R. 337; Ex. I, Idf. R. 305-6]. They further carried reports that the prosecutor in charge of this very inquiry let it be known that the grand jury was embarking upon a "top to bottom" investigation of "Communist groups and activities" and that "evidence of Communistic activities" would lead to prosecution "if sufficient" [R. 302, 304]. Neither Carter nor Goldschein on this record denied or explained these statements. Finally, if the Attorney General makes a determination that the Communist Party advocates over-

throw of government by force and violence,* it is no more than reason requires to assume that he will act on this conclusion in all respects that his law enforcement responsibilities dictate. That he would so determine and not prosecute under the Smith Act is not only unthinkable but contrary to all the advices reaching the press from the Department of Justice and the White House. [See Ex. D, Idf.; Ex. E, Idf.; Ex. I, Idf., *supra*; Ex. K, Idf. R. 339; R. 308.]

Thus, to appellants, whom the prosecutor believed to be high placed members of the Communist Party in Los Angeles County, the risk of prosecution on the basis of their answers was as direct, immediate and pressing as the cases require. The government's contentions to the contrary ignore the very facts upon which its counsel involved appellants in the investigation.

(c) The Cases Require That the Witness Show Only That the Peril of Prosecution Is a Reasonable One. Contrary to the Government's Arguments, There Is No Requirement That the Witness Be Under Investigation or in Such a Position That Prosecution "Develop Out of the Activities of the Very Grand Jury Before Which the Questions Were Propounded." (Appellee's Brief p. 22.)

The government contends that the test of whether the privilege may properly be claimed is whether "prosecution of the witness was likely to develop out of the activities of the very Grand Jury before which the questions were propounded" (Appellee's Brief p. 22). The government's position is that the witness may not claim his privilege unless he himself is in effect under investigation by the

*Which appellants offered to prove [R. 311] and the government now admits (Appellee's Brief p. 16).

grand jury. The government does not correctly state the law. This branch of the argument will show, *first*, that the witness may claim his privilege before any tribunal having power to summon him, and, *second*, that the claim of the privilege turns on the probative value of the witness' possible answer under the circumstances disclosed.

It was held as early as *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, that the object of the constitutional provision is "to insure that a person should not be compelled, *when acting as a witness in any investigation*, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters but it is as broad as the mischief against which it seeks to guard" (emphasis added) (142 U. S. p. 563, 35 L. Ed. p. 1114).^{*} As was stated in *Wilson v. United States*, 221 U. S. 361, 379, 55 L. Ed. 771, 778:

" . . . The privilege holds although the pursuit of the person required to produce has not yet begun; it is the incriminating tendency of the disclosure, and not the pendency of the prosecution against the witness, upon which the right depends. *Counselman v. Hitchcock*, 142 U. S. pp. 562, 563, 35 L. ed. 1113, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195."

The Fifth Amendment, then, protects against compulsory disclosure of facts incriminating to the witness in any type of proceeding, if in a criminal case it may be used in the proof to obtain a conviction or to discover such proof. For it is the purpose of the amendment to protect individ-

^{*}Later in the same opinion Justice Blatchford observed, "It is an ancient principle of the law of evidence, *that a witness shall not be compelled, in any proceeding*, to make disclosures or to give testimony which will tend to criminate him . . ." (emphasis added) (142 U. S. p. 564, 35 L. Ed. 1114).

uals from being forced to give from their own lips evidence upon which a prosecution might be based, or from which it may result. Following this principle the courts have upheld the claim of the privilege in proceedings where the witness was obviously *not* under investigation for the commission of crime and where the questions were *not* propounded in the course of any inquiry into criminal activities, so that there was absolutely no possibility that, in the government's words, "prosecution was likely to develop out of the activities of the very Grand Jury before which the questions were propounded." The cases are collated in appellants' brief in the *Alexander* case (App. Br. Alexander pp. 44-5).

The true test of whether the privilege is properly claimed is the probative relationship between the witness' possible answer and the incrimination he fears. By this is meant whether the answer which the witness might give would constitute (1) an admission of that crime or of an element of it, or (2) a link in the chain of proof of the commission of that crime, or (3) a means of discovering such proof. *In re Willie*, 25 Fed. Cas. 38; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110; *Ballmann v. Fagin*, 200 U. S. 186, 50 L. Ed. 433; *Arndstein v. McCarthy*, 254 U. S. 71, 65 L. Ed. 138; *Foot v. Buchanan*, (C. C. Miss.) 113 Fed. 156; *Ex Parte Irvine*, 74 Fed. 954; *United States v. Zwillman*, 2 Cir., 108 F. 2d 802; *United States v. Weisman*, 2 Cir., 111 F. 2d 260; *United States v. Cusson*, 2 Cir., 132 F. 2d 413; *United States v. Rosen*, 2 Cir., F. 2d, No. 209—October Term 1948, dec. April 25, 1948; *Smith v. United States*, U. S. S. Ct. No. 292—October Term 1948, dec. May 31, 1949.

Some questions on their face call for an answer which may be incriminating. Thus when Counselman was asked

whether he had ever obtained a railroad rate for the shipment of grain at less than tariff rates (142 U. S. p. 549, 35 L. Ed. p. 1111) he was called upon to admit or deny a crime. The probative effect of his possible answer was easily perceived. When he was asked whether he knew others doing this (142 U. S. p. 550, 35 L. Ed. p. 1112) his answer might have provided a link in the evidentiary chain to sustain a prosecution for the same kind of crime or provided the means of discovering such evidence. But in either case the probative usefulness of his possible answer was plain because the question in each case described a specific type of criminal activity.

Other questions examined on their face alone call for answers which appear to present no peril to the witness. There the witness' claim of the privilege had to be supported by a presentation of additional facts so that the court could perceive the probative effect of the possible answer in spelling out a sufficient connection with crime to expose the witness to prosecution. A clear example is *Ex Parte Irvine, supra*, where the witnesses, as here, were asked concerning their knowledge of allegedly unlawful activities of others. The court (p. 594) linked up the witness' possible answers with other testimony, given in the trial at which the witnesses were called to testify, to show that an apparently harmless question might produce an answer that would give rise to a risk of prosecution. In doing this the court evaluated the probative potential of the witnesses' possible answer and found that it was sufficient to expose them to prosecution.

The *Zwillman, Weisman, Cusson* and *Rosen* cases, *supra*, present this problem in a form extremely close to the situation at bar. In each case the questions dealt with

a connection between the witness and other persons;* they were directed at establishing an association between the witness and the others. In each case the court observed that such an association was innocent enough on its face in the absence of facts showing such association to have a possible criminal character. The witnesses claiming the privilege in those cases showed a likelihood that these other persons were involved in a criminal conspiracy. Thus, in *Zwillman's* case, *supra*, the witness admitted having been engaged in the liquor business during the time for which he was asked to name his business associates. The statute of limitations and the repeal of the National Prohibition Act saved him from prosecution as a bootlegger. But there remained the possibility of prosecution for conspiracy to violate the revenue laws relating to liquor, such as affixing stamps, paying taxes, etc. To admit his business associates the witness would have given an item of evidence which could be used in the chain of proof of conspiracy, *i. e.*, concerted action with others. The facts shown by him with reference to his liquor business in the period asked about could be added to other evidence to establish that the conspiracy was to violate revenue laws relating to liquor. From this it was apparent to the court that for Zwillman to acknowledge the associations inquired about raised a serious danger of prosecution. The facts which his answers might give had probative value taken together with other facts made known to the court in the direction of proving the crime for which he said he feared prosecution.

Similarly with the *Weisman* case, *supra*. Weisman was asked whether he knew persons who visited, lived in

*In the *Rosen* case the questions dealt with the witness' connection with an automobile. The issue is the same.

or stayed at Shanghai in certain years. He showed that the prosecutor had caused to be indicted a narcotics ring which operated between Shanghai and New York in those years and that the newspapers carried a story to the effect that a man who was described so as to resemble Weisman would be indicted in connection with the operation of that ring. With these facts the court could see that if Weisman acknowledged association with the persons inquired about his answer might have connected him with the conspiracy. Again it was the probative value of his possible answer in establishing association with persons involved in an allegedly unlawful conspiracy which indicated the possible exposure to prosecution from answering.

The *Cusson* case, *supra*, is strikingly similar to the one at bar. The question was directed at association between the witness and others at a time when the prosecutor evidently thought them engaged in a conspiracy to obstruct justice. The question, contrary to the government's assertion (*Appellee's* Brief p. 19) did not ask Cusson to divulge whether the Groveses had asked her to leave the country. It merely asked whether she had met with the Groveses just prior to their trial. The "setting" offered in support of her claim of privilege, such as her absence from the country from just before the trial until its close and the prosecutor's query whether she had been subpoenaed for it, permitted the court to see that there were other facts which, taken with an acknowledgment of association with the Groveses, would create such a chain of evidence as to make prosecution likely.

In the *Rosen* case, *supra*, the effect of the questions was to elicit whether the witness had been connected with a car which had figured prominently in one or more alleged conspiracies. Because the showing there, as in the pre-

ceding cases, indicated the nature of the conspiracy the court could see that an answer connecting Rosen with the car might connect him with the conspiracy.

The trivia urged by the government to distinguish these cases (Appellee's Brief pp. 17-21) denote differences that make no distinction. In each case the court examined the facts before it to ascertain whether an answer to the questions put could be linked with other facts in the chain of proof of crime so as to create a likelihood of prosecution if the answer were given. It is with this meaning that the court said the witness need "do no more than show that the answer is likely to be dangerous to him" (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262; *United States v. Zwillman*, 2 Cir., 108 F. 2d 802, 803) or that the witness must show a "setting which made it (*i. e.*, the answer) a possible step in the disclosure of a crime" (*United States v. Cusson*, 2 Cir., 132 F. 2d 413, 414).

The situation in the case at bar is closely analogous to these cases. The "setting" provided here has been reviewed in detail in Appellants' Opening Brief (pp. 14-26, 39-45). The manner in which appellants' possible answers might disclose association with a conspiracy the government claims is illegal has been explained at length (App. Op. Br. pp. 27-39, 45-50). The government has not ventured an answer to these contentions; it cannot because the facts are irrefutable. We submit that here also there has been shown the probative use to which appellants' possible answers might be put to connect appellants with an alleged conspiracy. The fear of exposure to prosecution under the Smith Act has been shown to be reasonable and likely. The facts support appellants' claim of privilege.

But the government would dispose of all these authorities by asserting that these appellants were advised that “the Grand Jury inquiry was *not* concerned with” them (Appellee’s Brief pp. 19, 4-6). The government knows that it is not bound by any of these assurances to appellants. Any prosecutor who, in the course of investigating one crime, finds evidence of another is bound by his oath of office to prosecute the participants in the latter. Assurance to a witness that he at the time of interrogation is not under investigation can mean no more than just that—he is not under investigation *at that time*. Surely the government does not mean that if his answers indicate a possible connection with a crime it will not then investigate and prosecute. The assurance that a witness is not under investigation is plainly not a promise of immunity for this can come only from statutory authorization,* and the government can point to no such statute here. Were such an assurance the equivalent of a prosecutor’s promise not to convict (and even the government makes no such claim) it nevertheless could not “do away with the constitutional privilege not to give evidence against himself, if he chooses to claim it” (*Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954, 964). In sum, the prosecutor’s assurances to appellants and their representations to the court, below and here, that appellants were not under investigation have no legal effect upon the issues presented here.

*See cases cited Appellee’s Brief, Alexander, page 48.

III.

The Record Provides a Basis for the Claim of Privilege Against Self-Incrimination for Conspiracy to Obstruct the Administration of Justice and the Government Has Made No Answer to Appellants' Argument.

The government sidesteps appellants' arguments on this point by asserting that appellants did not claim their privilege on this ground in the trial court (Appellee's Brief p. 24). This is simply not the fact. The claim was made on their behalf by their counsel when the government sought orders compelling appellants to answer [R. 581-4] and when the civil contempts were tried [R. 496-7]. It is no answer for the government to claim that the claim was not made personally by the appellants in their statements to the judge in chambers. Not all appellants chose to make such statements, and none rested his claim of privilege on such a statement alone.

Most importantly the government did not disclose that subpoenas had been issued for Dorothy Healey, and that she therefore was part of the charged conspiracy to obstruct justice, until *after* the private statements had already been made to the judge below. The government disclosure was first made during the interrogation of appellant Blair before the grand jury on January 12, 1949, which was not read in open court until February 11, 1949 [R. 551], on the proceedings for an order compelling appellants Blair, Brodsky, Caress and Spector to answer questions.* In the same proceedings appellants' counsel

*These began on February 11, 1949, and continued on February 18 and February 23, 1949. See R. 529, *et seq.*

asked the prosecutor to stipulate that a subpoena had been issued for Healey which he did, adding, "I have several subpoenas issued for Dorothy Healey" [R. 566]. It was in these same proceedings that appellants first asserted their claim of privilege for fear of prosecution for conspiracy to obstruct justice [R. 581-4]. In the contempt proceeding instituted on March 3, 1949 [beginning at R. 445] the claim of privilege on this ground was again asserted [R. 496-7].

The record is plain and incontrovertible that once the basis for such a claim had been laid appellants asserted it. Their claim was timely made and the basis for it amply proven.*

The government has utterly failed to answer any of appellants' arguments on this point. It can not be seriously contended that this claim of privilege could by any stretch of fancy "entirely defeat the purposes of the . . . Grand Jury" (Appellee's Brief p. 24). All agencies of government including the courts must withhold their power to force answers if they be such as might tend to incriminate. Specifically has this been held to apply to such a claim as is here advanced (*United States v. Cusson*, 2 Cir., 132 F. 2d 413). This is inherent in our system, and the frustration of an over-reaching prosecutor must not be considered the same as the subversion of a "constitutionally created body." The grand jury will survive long after history has passed by this current effort to prosecute political ideas and their advocates.

The government has not answered appellants' arguments on this point because it can not. Answers to the questions

*The facts are reviewed in Appellants' Opening Brief, pages 40-1, 50-3.

might plainly serve as part of the probative chain to link appellants with the conspiracy which the prosecutor on oath has said exists among the people inquired about. The government's failure to answer such a contention can only be interpreted as an admission by default of the validity of the appellants' claims.

IV.

The Questions Propounded to Appellants and the Orders of the Court to Answer Them Did Call for Compulsory Disclosure of Political Opinion and Association and Contravened All of the Constitutional Charges Invoked by Appellants.

As appellants have consistently pointed out the questions propounded to them were designed to establish their connection with the Communist Party. The questions and the orders to answer them therefore were directed to the compulsory disclosure by appellants of their political affiliation, and *pro tanto*, their political opinions.

It is the position of appellants that by virtue of the First Amendment the government is without power to intrude into the area of political belief and association; that under the Fourth and Fifth Amendments citizens have a right to privacy and silence in the face of an inquiry directed at their political beliefs and associations and that such an inquiry abridges the exercise by the people of their sovereign rights reserved to them under the Constitution of the United States. It is the fundamental premise of our law that the people are the ultimate repositories of sovereignty and that they created the government as their agent charged with powers and duties designed to effectuate the public will. The government created by the American people is a government of limited

powers and the very charter of government itself reserves to the people the powers of sovereignty not conferred upon their agent, the state. Our government is a representative government in the sense that its policy is determined by the people, its agents are selected by the people and both the agents of government and the government itself are responsible to the people for the discharge of their stewardship on the people's behalf. In order that this relationship between the people and the government may be established and the sovereignty of the people preserved the Ninth and Tenth Amendments reserved to the people those powers of sovereignty not delegated to the government.

For the proper effectuation of this scheme of government it is necessary that the people be completely free to voice their will in all aspects of the determination of state policy as well as to determine their representatives in the seat of government and to obtain from them an accounting for the discharge of their responsibilities. Specifically this means that the people must be free to hold and advance such ideas and opinions as may seem to them to be valid; to discuss these ideas fully that they may accept what is sound and reject what is not; and to form such associations for the advancement of their ideas as the effectuation requires so that in a complex society the right to speak may be made meaningful.

Such a structure of government and such a relationship between the citizenry and the state can not long endure when any agency of government takes to itself the power to condemn ideas, to hold people to account for their opinions or their speech, or to interfere with the full freedom of association for the advancement of ideas. Governmental inquiry into opinion, compelled by the coercive

power of the state, as much as punishment or censorship, impedes or suppresses the exercise by the people of their sovereign rights and is destructive of the very form of government itself. The authorities appellants have heretofore cited (App. Br., Alexander, pp. 51-80) support these principles.

To this the government has made but pale answer (Appellee's Brief pp. 25-29). *Abrams v. United States*, 2 Cir., 64 F. 2d 22 (cited in Appellee's Brief p. 27) has nothing to do with the point. There the witness was asked questions concerning his position in the Democratic Party and he asserted in support of his refusal to answer *only his privilege against self-incrimination*. As the opinion shows he offered no facts in support of his claim of privilege and the court was unable to see how any answer, standing alone or coupled with other facts, could possibly be used to disclose the commission of a crime or lead to the discovery of such evidence. The witness in the *Abrams* case completely failed to show any likelihood of prosecution resulting from an answer. It should be specifically noted that the case did not deal with the problem presented under this subdivision of the argument.

The government places heavier reliance upon *Barsky v. United States* (App. D. C.), 167 F. 2d 241. In that case the court stated that a congressional committee did have power to demand answers to questions concerning belief in Communism and membership in the Communist Party. The same court has reached a similar conclusion in the case of *Larson v. United States* (App. D. C.), No. 9872, dec. June 13, 1949. These cases, however, proceed upon a completely inverted concept of the guarantees of the Bill of Rights here involved and are hardly persuasive authority. In the *Barsky* case the court reasoned that

the Congress could compel citizens to disclose belief in Communism and membership in the Communist Party because that philosophy of government constituted such an important threat to our present form of government. It was further justified on the thesis that the government had the obligation to maintain itself in order to protect the rights of the people and therefore that it is the role of the government rather than the people to determine what form of political change is advisable; that it is for the government, not the people, to initiate political change (167 F. 2d pp. 246-7). This of course runs counter to our entire constitutional tradition which is based upon the assumption that it is the people themselves, free of governmental interference, who can determine not only the policies and personnel of government but the extent and manner of changing it.

The thesis of the *Barsky* case was carried to a constitutional absurdity in the *Lawson* case where the power to ask concerning membership in the Communist Party was raised in connection with men who were writers for the screen. There the court observed:

"No one can doubt in these chaotic times that the destiny of all nations hangs in balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world. . . . It is equally beyond dispute that the motion picture industry plays a critically prominent role in the molding of public opinion and that motion pictures are, or are capable of being, a potent medium of propaganda dissemination which may influence the minds of millions of American people. This being so, it is absurd to argue, as these appellants do, that questions asked men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions re-

quire disclosure of whether or not they are or ever have been Communists, are not pertinent questions.”

The decision in this case departs from the concept that government may not regulate or otherwise interfere with the right of the sovereign people to think as they will and to say what they think. The proscription of the First Amendment that Congress shall make no law is by this decision rendered meaningless. According to the decision, the First Amendment now reads that “Congress shall make no law—except in ‘chaotic times’; and, except where there is a ‘current ideological struggle’ in which ‘the destiny of all nations hangs in balance.’” In other words, the decision declares the First Amendment to mean that the right of dissent may be maintained except when its importance becomes critical. Thus, the concept that it is the people themselves who, by the free exchange of opinion determine for themselves the vital and critical problems of their times, is transformed into the proposition that the people may decide only unimportant things and that their servant, the government, shall control what they may say and what they may think concerning matters which will determine their destiny.

Patently when the decision uses phrases like “ideological struggle” and “propaganda dissemination” it is using emotionally surcharged synonyms for words like “sharp debate” and “meaningful speech.” But both sharp debate and meaningful speech are within the protection of the First Amendment even when they touch upon issues which affect the “destiny of all nations” in “chaotic times.”

For as Mr. Justice Jackson phrased it in *West Virginia v. Barnette*, 319 U. S. at pages 640-642:

“But freedom to differ is not limited to things that do not matter much. That would be a mere

shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*" (Emphasis added.)

Nor is it possible to square at all the *Barsky* and *Lawson* decisions on the meaning of the First Amendment with the succinct language of Mr. Justice Holmes, dissenting in *Gitlow v. New York*, 268 U. S. p. 673, 69 L. Ed. p. 1149:

"Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. *If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their say.*" (Emphasis added.)

Thus spoke a great judge who had faith in the judgment of the people during "chaotic times" not unlike the present "cold war." And it is significant that these sentiments of Mr. Justice Holmes once written for a minority have now become the accepted views of the majority of the United States Supreme Court. (See *Bridges v. California*, 314 U. S. 252, 86 L. Ed. 192; *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796; *Thomas v. Collins*, 323 U. S. 516, 89 L. Ed. 430; *Thornhill v. Alabama*, 310 U. S. 88, 84 L. Ed. 1093.)

It is these considerations that the government's brief makes no attempt to answer. They go, we submit, to the basic question of our time: whether the people have ever conferred upon the state the power to investigate into and to curb ideas and associations to advance ideas. The complete immunity of opinion and association under our constitutional system is the cornerstone of our freedom. It is more important as the Supreme Court has recently pointed out than the formal preservation of law and order as conceived by those temporarily in power (*Terminiello v. Chicago*, Supreme Court of the United States, Case No. 272, October Term 1948, dec. May 16, 1949).

Conclusion.

For all the reasons urged herein and in Appellants' Opening Brief the judgments below should be reversed.

Respectfully submitted,

MARGOLIS AND McTERNAN,

BEN MARGOLIS,

JOHN T. McTERNAN,

Attorneys for Appellants.

WILLIAM B. MURRISH,

JOHN W. PORTER,

ESTHER SHANDLER,

JACK TENNER,

Of Counsel.

No. 12,217
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL H. KASINOWITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

HENRY STEINBERG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BEN DOBBS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

FILED

ERNEST A. TOLIN,

MAR - 6 1950

United States Attorney,

ROBERT J. KELLEHER,

PAUL P. O'BRIEN,

CLERK

Assistant U. S. Attorney,

600 U. S. Post Office and Court House Building.
Los Angeles 12, California,

Attorneys for Appellee.



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No. 12,217

IN THE

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PETITION FOR REHEARING.

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal, the judgments on appeal herein having been filed February 4, 1950.

I.

Preliminary Statement.

This Court by its Amended Opinion filed February 4, 1950, reversed judgments in *criminal* contempt sentencing each appellant herein to one year in jail for refusing to answer certain questions before the grand jury and ordered the proceedings below dismissed "as to the questions other than those concerning Mr. and Mrs. Healy." As to those questions the cases were remanded and the District Court ordered to admit evidence tendered with respect to their believed connection with the Communist Party.

On the same day, February 4, 1950, this Court filed its amended opinions respectively in the cases of *Alexander et al. v. United States*, No. 12,081, and *Doran et al. v. United States*, No. 12,221, in each of which judgments and commitments in *civil* contempt were reversed and the proceedings ordered remanded for specified further proceedings as to certain of the appellants.

These latter two cases will become moot on March 15, 1950, at which time the extended term of the grand jury before which the appellants appeared will have expired. For the purposes of further proceedings before the grand jury those two cases are therefore considered moot and the questions therein raised on the merits are now academic.

This case, being an appeal from a judgment in *criminal* contempt, is not moot and is distinguishable from the *civil* cases. The Amended Opinion in the instant case, however, is predicated on the "reasons stated in the *Alexander* and *Doran* cases" (Amended Opinion p. 2).

This petition for rehearing is made upon the ground that the Amended Opinion herein rests upon certain prem-

ises (some of which are contained in the *Alexander* and *Doran* Amended Opinions) which appear to be in error as will be set forth hereinbelow with particularity.

This petition for rehearing is made upon the further ground that the opinion herein should properly be separate and apart from the opinions in the *Alexander* and *Doran* cases and should be predicated upon premises applicable to the record in the instant case as distinguished from the inapplicable matters contained in the *Alexander* and *Doran* Amended Opinions.

II.

The Court in Its Amended Opinion Erroneously Asserts That “These Questions Were Asked in Continuation of the Questioning of Them in the Alexander Cases.”

By stipulation of the parties and upon order of this Court the appeals and the records in the instant cases and the *Doran* cases were “consolidated for the purpose of appeal” [R. 143-144].

Also by order of the District Court in the proceedings hereinbelow the matters of defense offered by appellant Dobbs were incorporated as defensive matter in behalf of all the appellants herein [Kasinowitz, R. 345, 434; Steinberg, R. 345, 440-1].

However, it is apparent from the stipulation, from the order of the Court below, and from the questions herein involved, that it was not conceded by the Government, nor was it contended by anyone concerned, that the questions with which the instant appeal is concerned were a continuation of the questioning of the appellants in the *Alexander* cases. In those cases the appellants herein were questioned

about their knowledge of the organization of the Los Angeles County Communist Party [Kasinowitz, R. 225-226; Steinberg, R. 207-208; Dobbs, R. 215-216].¹

The questions with which the instant appeal is concerned are on their face plainly directed, not to the knowledge the witnesses might have of the Los Angeles County Communist Party or its organization, *but solely to the knowledge of the witnesses as to the whereabouts of a person whom the grand jury desired to locate, subpoena and bring before them to testify.*

III.

The Court by Its Amended Opinion Has Injected the Erroneous Inference That There Are Involved Herein Questions Other Than Those Concerning Mr. and Mrs. Healy.

On page two of its Amended Opinion in the instant case the Court states as follows:

“The judgments are reversed and the proceedings below against the appellants are ordered dismissed *as to the questions other than those concerning Mr. and Mrs. Healy.*”²

The appellants were asked no questions in this case other than those concerning Mr. and Mrs. Healy [Kasinowitz, R. 225; Steinberg, R. 234-235; Dobbs, R. 217].

The appellants were ordered by the District Court to answer no questions other than those concerning Mr. and Mrs. Healy [Kasinowitz, R. 228; Steinberg, R. 238; Dobbs, R. 212].

¹References are to the *Alexander* record.

²Italics added.

The presentments, respectively, charged the refusal to answer no questions other than those concerning Mr. and Mrs. Healy [Kasinowitz, R. 2; Steinberg, R. 5; Dobbs, R. 8].

It is respectfully submitted, therefore, that the Amended Opinion of this Court so far as it orders the dismissal “as to the questions other than those concerning Mr. and Mrs. Healy” creates a serious ambiguity, is meaningless and makes uncertain the judgment and opinion of this Court.

IV.

The Amended Opinion of the Chief Judge “Individually Supplementing the Court’s Opinion” Rests Upon Erroneous Considerations Which Have No Application to This Case, as Should Be Made Clear by the Opinion in This Case.

A. The individual supplement to the Court’s Opinion in the *Alexander* case refers to, “a published press release of the Department of Justice, dated June 15, 1945 (*sic*)”³ which “describes the cases pending in this Court as a part of ‘the prosecution * * * against communists in the United States.’ ”

The record in this case and in the *Alexander* and *Doran* cases is barren of any such press release. On its face the reference press release is erroneous because it purports to be a statement made in 1945 referring to the proceedings involved in this case; these proceedings were not commenced until more than three years later, that is to say in October, 1948.

³Added.

B. The individual supplement to the Court's Opinion refers to the magazine "Look" on August 30, 1949, as the source of the Attorney General's opinion upon which the Court relied. That a non-official publication, of any sort, is hearsay and unreliable for the establishment of the truth of any matter of fact therein alleged seems clear. That a publication of the character of Look magazine should be raised to the dignity of official recognition by a United States Court of Appeals as the medium of official pronouncement by a Cabinet officer is to accept as authoritative and permissible a form of evidence which is repugnant under the rules of any court. To accept from outside the record facts gleaned from such a source and to take them as true for the purpose of grounding an opinion on appeal in this Court is to set a precedent which we respectfully urge the Court should disavow.

It should be added further that the issue of Look magazine upon which the Court relied bore a date subsequent to the end of all proceedings in the Court below, was dated after the appeal herein was ordered submitted, and was published at a time when the Attorney General whose views it purported to express was thereafter constrained to remain silent, by reason of his elevation to the office of Associate Justice of the Supreme Court of the United States.

C. The individual supplement to the Court's Opinion recites that February 4, 1950, was the last day of the term of the grand jury in the *Alexander* civil contempt cases and that failure to decide that case on that day would result in it becoming moot. The records of the District Court for the Southern District of California reflect that the term of the grand jury in the *Alexander* cases (being

the same in this case and the *Doran* case) has not yet, as of March 1, 1950, expired. We respectfully agree, however, that for the purposes of the *civil* contempt cases (*Doran* and *Alexander*) the matter is in a practical sense moot because the judgments therein provided that the witnesses be committed until they returned to the grand jury and answered the questions. At the end of the grand jury's term on March 15, 1950, the appellants in the civil cases could no longer be in contempt.

The Amended Opinion in the instant case adopts "the reasons stated in the *Alexander* and *Doran* cases" (p. 2). We respectfully urge that the reasons intended to apply should be stated.

V.

The Amended Opinion of the Court Is Uncertain and Ambiguous Insofar as It Orders the District Court to Admit the Evidence Tendered With Respect to the Believed Connection of Mr. and Mrs. Healy, With the Communist Party.

It is noted that Judge Pope concurs in the result only in this case "and with the reservations noted in my concurring Opinion in *Alexander v. United States of America*, No. 12,081" (p. 2). Included in the reservations noted were those pertaining to the propriety of admitting or requiring evidence of the prosecutor's plans, as stated by Judge Pope, at page 15, of the *Alexander* Amended Opinion:

"* * * My own Opinion is that it would be intolerable interference with the work of the United States Attorney if he must be subjected to an inquisition as to his plans and purposes in respect to future prosecutions merely because some recalcitrant witness chooses to test his constitutional privilege. I think it is not in the public interest. * * *"

Similarly, Judge Pope on the same page in the *Alexander* Amended Opinion, noted his reservation in regard to the admissibility of newspaper articles:

“I think the approval of the newspaper articles is particularly unfortunate.”

All of the matters offered to be proved by the appellants herein fell within the reservations noted by Judge Pope. The matters offered to be proved consisted of:

- (a) Testimony of the prosecutor as to information in his possession regarding the purposes of the grand jury.⁴
- (b) Excerpts from a publication described as the findings of the Joint Fact Finding Committee on un-American Activities of the California Legislature.⁵
- (c) Los Angeles newspaper reports of alleged statements by the prosecutors.⁶

Since three judges other than Judge Pope dissented in the present case, and since by his reservations noted in the *Alexander* case, Judge Pope appears to have dissented from the Court's Amended Opinion with regard to the admissibility of all the proffered evidence, it appears not to be the judgment of a majority of the Court that the proffered evidence be admitted upon remand to the District Court. We respectfully urge that the order directing the District Court with respect to the admission of evidence, if any, should be clarified.

⁴R. 257-261, 277-279, 364-366.

⁵R. 285.

⁶R. 302, 304.

Conclusion.

Upon the foregoing grounds it is respectfully submitted that a rehearing should be granted, that this case should be decided upon the basis of the seven questions, all pertaining to Mr. and Mrs. Healy, which were asked of appellants and that upon a remand, if any, to the District Court, that Court be directed with particularity as to the proffered evidence, if any, which should be admitted.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

ROBERT J. KELLEHER,
Assistant U. S. Attorney,
Attorneys for Appellee.

Certificate of Counsel.

We, Ernest A. Tolin, United States Attorney, and Robert J. Kelleher, Assistant United States Attorney, attorneys for the Appellee hereby certify that in our opinion the above petition for rehearing is well founded and is not interposed for delay.

ERNEST A. TOLIN,
United States Attorney.

ROBERT J. KELLEHER,
Assistant U. S. Attorney.

No. 12321

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, *et al.*,

Appellants,

vs.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA; RICHARD F. WALSH; ROY M. BREWER; LOEW'S, INCORPORATED, *et al.* (Paramount Pictures, Inc., Warner Brothers Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Twentieth Century-Fox Film Corporation, R. K. O. Radio Pictures, Inc., Universal Pictures Company, Inc., and Association of Motion Picture Producers, Inc.)

Appellees.

OPENING BRIEF OF APPELLANTS.

ZACH LAMAR COBB,

929 Citizens National Bank Building, Los Angeles 13,

Attorney for Appellants.





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No. 12321

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, *et al.*,

Appellants,

vs.

THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA; RICHARD F. WALSH; ROY M. BREWER; LOEW'S, INCORPORATED, *et al.* (Paramount Pictures, Inc., Warner Brothers Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Twentieth Century-Fox Film Corporation, R. K. O. Radio Pictures, Inc., Universal Pictures Company, Inc., and Association of Motion Picture Producers, Inc.)

Appellees.

OPENING BRIEF OF APPELLANTS.

Introduction.

This appeal, and appeals Nos. 12345 and 12346, from orders of dismissal (Appendix "A," "B"), relate to the same general subject matter. 84 F. Supp. Adv. 669.

In this case certain employees sue as individuals for themselves, and their class, without diversity of citizenship, but within the jurisdiction provided by the Constitution and certain designated laws of the United States.

In Studio Carpenters Local Union No. 946 v. Loew's, Inc., *et al.*, No. 12345, plaintiffs' union, representing its members, sues the same defendants, also without diversity, but within said jurisdiction. 84 F. Supp. Adv. 675.

In Andrew MacKay v. Loew's, Inc., No. 12346, and the several cases consolidated therewith on appeal, individual employees, belonging to said class and union, sue their respective individual employers with jurisdiction based upon diversity. 84 F. Supp. 676.

Up to 2,000 individual suits could be brought with diversity of citizenship. But why so burden the Courts?

It is unfortunate that this aggrieved class, and its individuals, have had to file and appeal ten cases, where, it is submitted, the district court has jurisdiction in all, and where, it is further submitted, it would be in the public interest to try all cases in a single proceeding.

At the appropriate time, if the several jurisdictions are upheld upon these related appeals, plaintiffs will ask the guidance of this Honorable Court upon the consolidation of the cases, in which jurisdiction is found to exist, to permit an expeditious trial of all said actions in a single proceeding.

Reference is made to the Union's motion to intervene in this case, and to the minute order showing the contemplation that the cases would be consolidated. [R. pp. 2, 7.]

Statutory Provisions Sustaining Jurisdictions.

The jurisdiction of the District Court is sustained by:

The Fifth and Fourteenth Amendments to the Constitution of the United States;

28 U. S. Code, Sections 1331, 1337 and 1343; and the following particular statutes:

National Labor Relations Act, hereafter called NLRA;

Labor Management Relations Act of 1947, hereafter called LMRA, particularly Sections 7, 301 and 303 (29 U. S. C. A. Supp. 157, 185 and 187);

Social Security Act, Sections 301, 302 and 303, as amended (42 U. S. C. A. 501, 502 and 503, as amended);

Civil Rights Act of April 20, 1871; R. S. 1979 and 1980(3) (8 U. S. C. A. 43 and 47(3));

Sherman Act, Section 1, as amended; 26 Stat. 209; 50 Stat. 693; (15 U. S. C.); and

Clayton Act, Section 4; 38 Stat. 731 (15 U. S. C. 15);

California Unemployment Insurance Act, General Laws of California, Act No. 8780(d), as amended, particularly Sections 56(a), 70, and related sections and Regulations, in their relation to said Federal Social Security Act.

The jurisdiction of this Honorable Court to review the judgment of dismissal of the District Court is sustained by 28 U. S. Code, Section 1291.

Allegations Showing Jurisdiction.

The second amended and supplemental complaint contains four causes of action, with jurisdictional allegations in the first paragraph of each. [R. pp. 8, 26, 30, 33.]

The first count of the complaint alleges all of the essential jurisdictional facts under 28 U. S. Code 1331 and 1337, and under Section 301 of the Labor Management Relations Act:

That the defendant companies are engaged in interstate commerce. [Par. III; R. p. 9.]

That plaintiffs, and the class for whom they sue, as members of Local 946, United Brotherhood of Carpenters, were working under collectively bargained contracts including Exhibit "A" with defendant IATSE [Par. VII; R. p. 11], Exhibits "B-1" to "B-8," inclusive, with both the IATSE and the employer defendants [Pars. IX-XVI; R. pp. 12-14], and Exhibit "B-9," as an "Interim Agreement" with the employer defendants. [Par. XVII; R. p. 14.]

That on September 23, 1946, while plaintiffs, and their class, were working thereunder, the conspiring defendants violated said contracts, by a mass lockout in which plaintiffs, and all of their class, were deprived of their work tasks, and replaced therein by the IATSE, in violation of the contracts [Pars. XIX-XXXVII; R. pp. 15-24]; that said violations have continued ever since [Par. XXXV; R. p. 23]; to their damage in sums in excess of \$3,000 each, exclusive of interest and costs, and in amounts that

will require an equitable accounting. [Pars. I, XXXVIII, XXXIX; R. pp. 8, 24, 25.]

The second count adopts paragraphs II to XXXVIII of the first count, and alleges all the essential jurisdictional facts under 28 U. S. Code 1331 and 1337, and Section 303 of the LMRA [R. pp. 26-30], particularly alleging:

That plaintiffs, and said class, were so deprived of their work tasks by the defendant employers under threats from the defendant IATSE, in the terms of said Section 303(a)(4) of the LMRA [Pars. III-IV; R. pp. 26-27];

That defendants have continued, and still continue, said unlawful boycott. [Pars. V-VI; R. p. 27.]

That the charges of unfair labor practices were referred to an IATSE member as Field Examiner and suppressed. [Pars. VII-IX; R. pp. 27-29.]

To the damage of plaintiffs, and said class, as previously alleged. [Pars. X-XI; R. pp. 29-30.]

The third count adopts said paragraphs II to XXXVIII of the first count, and alleges all the essential jurisdictional facts under 28 U. S. Code 1343, and R. S. ^{1779, 1980} ~~1779, 1780~~ (8 U. S. C. 43, 47); Federal Social Security Act, Section 303 (42 U. S. C. 503); California Employment Act, Section 70 (Cal. Gen. Laws, Act 8780(d)), Section 70, and Regulations, Art. 31, Sections 310 and 315. [R. pp. 30-32.]

In denying plaintiffs, and their class, their civil right to bargain under Section 7 of the NLRA, as re-enacted in Section 7 of the LMRA [Pars. III-V; R. pp. 30-31];

In causing the NLRB to deny plaintiffs, and their class, full, fair, open and impartial hearings upon unfair labor practice charges filed by members of the class [Par. VI; R. p. 31];

In causing said California Department of Employment and its Boards and Officers to deny plaintiffs, and their class, full, fair, open and impartial hearings upon their claims for unemployment and disability insurance benefits [Par. VII; R. p. 32];

To their damage as aforesaid.

The fourth count adopts said paragraphs II to XXXVIII of the first count, and makes additional allegations of violations of the Sherman and Clayton Acts [R. pp. 33-35]; to the damage of plaintiffs, and the members of their class, as aforesaid.

ABSTRACT AND STATEMENT OF THE CASE.

The following abstract of the complaint and statement of the case, it is respectfully submitted, is as concise and succinct as the questions involved permit. It will be referred to, without unnecessary repetition, in argument.

First Count.

In addition to the allegations of jurisdiction, the identity of the parties, and the class for whom plaintiffs sue, the first count particularly alleges the facts essential to jurisdiction under Section 301 of the LMRA, and under 28 U. S. Code, Sections 1331 and 1337, as follows:

That the defendant motion picture companies, plaintiffs' employers, are engaged in interstate commerce. [R. p. 9.]

The collectively bargained contracts are alleged as follows:

The Exhibit "A" jurisdictional agreement of July 9, 1921, between plaintiffs' United Brotherhood of Carpenters and the IATSE, settling the jurisdictional division of work between the two crafts [R. pp. 11, 36], *with the allegation that this contract has never been terminated.* [R. p. 12.] There was, therefore, no basis for the pretense of a jurisdictional dispute.

The Exhibit "B-1" basic agreement of November 29, 1926, between the employer defendants and both plaintiffs' Brotherhood of Carpenters and said IATSE, while the Exhibit "A" jurisdictional agreement was in operation, and the Exhibits "B-2" to "B-8" extensions, re-

newals and enlargements thereon [R. pp. 12-14, 41-54], including the Exhibit "B-6" closed shop agreement [R. pp. 13, 52], also made while said Exhibit "A" jurisdictional agreement was in operation, and the agreements on mechanics wage scale and working conditions referred to in said Exhibit "B-8", which provided for a six hour day, with time and one-half for overtime [R. pp. 14, 54], and the extension of said Exhibits "B-1" to "B-7", inclusive, to October 13, 1946, by said Exhibit "B-8". [R. pp. 14, 54.] Said Exhibit "A" jurisdictional agreement thereby, in effect, became a working part of the collectively bargained agreements between the defendant Motion Picture Companies and both the Brotherhood of Carpenters and the defendant IATSE. There was, therefore, no basis for the pretense of a jurisdictional dispute between any of the parties.

The Exhibit "B-9" "Interim" agreement of July 2, 1946, between plaintiffs' Local 946 and said employer defendants, including provisions for a *two year period*, and *pending the signing of formal contracts, that is, pending the negotiation of formal contracts*, and likewise containing provision for a six hour day. [R. pp. 14, 55-60.]

That plaintiffs, and their class, worked under said contracts [R. p. 15] until they were removed from their work tasks by the defendant employers, and replaced with the IATSE, in the mass lockout of September 23, 1946 [R. pp. 22-24.] Plaintiffs, and said class, therefore, became parties to all of said contracts, entitled to all rights thereunder.

The violation of all of said collectively bargained contracts, by all defendants, in said mass lockout and replacement is alleged, as follows:

In the conspiracy of April, 1945, to replace the carpenters with the IATSE, in violation of all of said collectively bargained contracts, between the Brotherhood of Carpenters and the IATSE [Exhibit "A"; R. p. 36], and between the employer defendants and both the Brotherhood of Carpenters and the IATSE [Exhibits "B-1" to "B-8", incl.; R. pp. 41-54], as alleged in paragraphs XIX-XXI [R. pp. 15-17].

The Exhibit "C-1" letter from defendant Walsh, as president of defendant IATSE, of April 14, 1945, addressed "To all former studio employees," proclaimed the agreement between the IATSE and defendant Producers Association to replace all carpenter employees with the IATSE [Par. XX; R. pp. 16, 61], as follows:

"First of all, I want you to know that the International Alliance has reached an agreement with the Producers Association by which the I.A.T.S.E. will supply all labor to the studios, * * *" [R. p. 61.]

And admitted, as alleged in paragraph XXI [R. p. 16], that the IATSE had organized its carpenters' union to place IATSE men in the work tasks belonging to plaintiffs, and their class, as members of Carpenters Local 946, under said contracts, as follows:

"On Tuesday night of this week a Carpenter's Local was chartered and is now known as Local No. 787 of the I.A.T.S.E. * * * there will be a local charter for Machinists, and if necessary for other crafts. *We are proceeding in accordance with our agreement with the Producers to man the studios.*" [Italics ours; R. p. 63.]

The AFL thereafter declared said IATSE "Carpenters Local 787" illegal and caused the IATSE to withdraw its charter. [Par. XXI; R. pp. 16-17.]

Fraud Practiced by IATSE Causing Ambiguous and Void Award.

In the fraud practiced by defendants IATSE and Walsh upon the AFL Executive Council Committee, by means of the false and fraudulent testimony of defendant Walsh [Exhibit "C-2"; R. p. 65], which was kept secret from plaintiffs, and their class, and which caused said AFL Committee to render its ambiguous award [Exhibit "C-3"; R. p. 73], with void provisions having the effect of taking certain carpenters' work tasks from plaintiffs, and their class, and giving it to said IATSE, in violation of said Exhibit "A" and Exhibits "B-1" to "B-8" collectively bargained agreements, as alleged in paragraphs XXII to XXIX. [R. pp. 17-20.] *Said AFL Committee thereafter corrected said ambiguity, and rectified said award, by the issuance of its Exhibit "C-4" clarification on August 16, 1946, as is alleged in paragraph XXIX. [R. p. 20.]* This removed the ambiguity and validated the award. The Exhibit "C-3" award, as so clarified by the Exhibit "C-4" clarification, confirmed the right of plaintiffs, and their class, to construction work on sets [R. p. 79], as follows:

"* * * The word erection is construed to mean assemblage and such sets on stages or locations. It is to be clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction."

There was no basis, therefore, for the pretense of a jurisdictional dispute under or following said award, as so clarified, and originally intended.

Attention has been called to said IATSE fraud upon the AFL, and to the ambiguity, and void provisions, in

the Exhibit "C-3" award caused thereby, and to the Committee's "C-4" clarification, clearing the ambiguity, and restoring the award to its original intent of following said collectively bargained agreements, because of the fraudulent pretenses adopted by the conspiring defendants in the mass lockout and replacement that followed.

The Threats, and the Lockout and Replacement Conspiracy.

In the conspiracy of August and September, 1946, as is alleged in paragraphs XXX to XXXVII [R. pp. 21-24], and as is shown in the Exhibits "D-1" to "D-9" minutes of the meetings of the Producers Labor Committee, a committee composed of representatives of each of the defendant motion picture companies. [R. pp. 81-102.]

The Minutes Showing the Unlawful Threats.

The Exhibit "D-1" minutes [R. p. 81] show the threat of the defendants IATSE and Walsh, on August 22, 1946, that if the defendant companies respected said Exhibit "C-4" clarification, correcting said fraudulently induced and void provisions in the said Exhibit "C-3" award, said companies would "have all work stopped in the studios, exchanges and theatres," as follows:

"Discussed new A. F. L. directive (clarification) as to its effect on existing conditions and what it may lead to.

"Later: Walsh advises that any company that makes one single change in the administration of the A. F. L. directive (award) in compliance with the new interpretation (clarification) will have all work stopped in the studios, exchanges and theatres."

The Minutes Showing the Conspiracy, Mass Lockout and Mass Replacement.

Said Exhibit "D-2" minutes of the September 3, 1946, meeting show the pretense of the companies that they could not understand the award or the clarification, as follows:

"Also wire Eric Johnston still can't understand the directive or its interpretation—is this a directive to compel us to abide or what shall we do. Both Carpenters and Walsh have given us opposite instructions. As we are between *A.F.L. Council must tell us what to do.*" (Italics ours.) [R. p. 82.]

They were asking for an AFL clarification, while refusing to abide by the one they had just received.

Said Exhibit "D-3" minutes of the September 11, 1946, meeting, show that the carpenters did no more than ask that the decision of the AFL, in the award as clarified, and the contracts, be respected [R. pp. 83-84], as follows:

"Cambiano stated he had copies of the directive's (award) interpretation (clarification) and letter from Green stating copies had been sent to Johnston for the industry's information, and that he was here to ask that it be put into effect on the first shift Thursday morning (9/12/46).

"Skelton stated he understands construction to include laying out of sets, laying flooring, cutting flooring, plumbing up sets, etc. Assembling he thinks 'is the same as prior to March 12, 1945—done by laborers and I.A. setting to a line.'

"Kahane inquired *what will Carpenters do if we do not follow the interpretation. Cambiano answered 'If you do not follow it sets will be declared hot and and we won't work on them.'* (Italics ours.)

"It was further stated by Cambiano that the sets were not only after tomorrow—that sets currently built would be finished by Carpenters." (Italics ours.)

There was no threat to strike. The Carpenters merely asked what belonged to them, and what they had done for years, and what the AFL award as clarified directed.

These minutes show the continued conspiracy, and continued construction of sets by the IATSE, in violation of the contracts, and of the award as clarified, for the fraudulent purpose of assigning carpenters to work in finishing off the illegal sets, with the fraudulent intention to thereby create a fictitious *impasse* between the companies and the carpenters. These minutes continue:

"The lawyers were asked what our rights are as to firing men for refusing to perform work assigned and what should be done or said in the matter. The following was decided upon: If any men refuse to perform services, lay them off and pay for hours worked only. Put on card 'layed off for refusal to perform work assigned.' Each studio not represented was notified of above by telephone." [R. p. 85.]

While carrying on this pretense of an *impasse* with the carpenters, the companies were in an advance agreement with the IATSE to give it all carpenters' work in the studios. The minutes continue:

"Kahane answered a phone call and on returning stated 'Brewer says instructions to man the companies means—furnish * * * Carpenters, etc.'"
[R. p. 85.]

Said Exhibit "D-4" minutes, of the September 12, 1946, meeting show that the New York presidents of the companies, and the president of the Association, were

parties to the conspiracy to replace all carpenters with the IATSE if the carpenters refused to abandon their contractual work tasks:

“Mr. Kahane reported the recent conversations with the Presidents and Eric Johnston which contained the following recommendations: ‘Lay off Carpenters if they refuse to perform the services to which they are assigned. Do not be in any hurry—take as much time as you can before crossing jurisdictional lines. Work with the I.A. to get a sufficient number of Carpenters, * * *’ [R. p. 86.]

And show the agreement in advance of the companies to so replace the carpenters with the IATSE on Monday, September 23, 1946 [R. pp. 87-88]:

“It was agreed by those present to follow the 2nd course but to take time to face the issues and not to put on any I.A. men in place of strikers until after Monday. No one will have to close down a picture on account of no sets before Monday.

“It was decided to call in Brewer to tell him of situation and find out from him if the I.A. is to furnish men to fill places vacated to keep the studios open. * * *”

“The Producers Labor Office will act as a central clearing house to receive daily reports from Studios of the number of men laid off * * *”

“Goldberg asked if he should assign more Carpenters to fill the places of the ones just laid off until all Carpenters are gone and then ask I.A. to fill vacancies. He was advised not to make any substitutions till after Monday next week.”

And that it was agreed to do all of this under a uniform plan. Their premeditated conspiracy to create a fictitious incident was expressed in the following sentence from said minutes:

"It was agreed each Studio would assign work to Carpenters by Monday to create an incident." (Italics ours.) [R. p. 89.]

It was by this fraud that *all carpenter employees, not merely those who had customarily done construction work on sets, were laid off as "off payroll" employees, and replaced with the IATSE, in the fraudulent mass lockout of Monday, September 23, 1946.*

Said Exhibit "D-5" minutes, of the September 16, 1946, meeting show the conspiracy of the Major Motion Picture Companies, while so acting in conspiracy with the IATSE, *a week before the lockout*, to make a false report to the California Unemployment Authorities, to the effect that the carpenters had left their work on account of a trade dispute, so as to deprive carpenters of the unemployment insurance benefits that would be due them under law.

"Unemployment Compensation — Cragin of the Loeb office wanted instructions for the Comptrollers as to what position the Producers wanted to take on statement to be made to the State Unemployment Fund. It was agreed to say 'the employee left his work on account of a trade dispute' and to ask the Department to disqualify him for unemployment compensation." [R. p. 90.]

Said Exhibit "D-6" minutes, of the September 17, 1946, meeting *show the agreement of the conspiring*

IATSE and Major Motion Picture Companies to force the independent motion picture companies to abide by their conspiracy, as follows:

“Brewer wanted to correct an erroneous opinion that Independents were not being forced to use Erectors. They are.” (Italics ours.) [R. p. 92.]

They also show the agreement *“to put I.A. men on sets so Carpenters * * * will quit”*; and a discussion of *“the proper method of procedure—how and when to get Carpenters * * * to refuse to work—when to replace with I.A. etc.”* [R. p. 93]; and an agreement that *“There is to be no hurry to clean out all Carpenters * * * immediately—running into Friday or even Saturday if necessary”* [R. p. 94]; and a discussion upon the prospective lowered working conditions of the IATSE replacements (italics ours), as follows:

“Overtime and 6 or 8 hour day—No decisions reached—let conditions dictate.” (Italics ours.) [R. p. 95.]

It was upon this conspiracy that the Major Motion Picture Companies, in the dominance they held over the Independents, and the IATSE, forced the Independents to discriminate against the carpenters.

Said Exhibit “D-7” minutes of the September 20, 1946, meeting show an agreement to avoid negotiations with the carpenters, in disregard of their contractual obligation to negotiate, as follows:

“Kahane read a proposed reply prepared by Byron Price to the telegram sent by C. S. U. to Pat Casey, dated September 19, 1946. He thinks we should not meet with them before Sunday as they could then use

the argument that the break came on account of wages and not jurisdiction and further we should not offer to negotiate while they refuse to work under their interim agreement.” [R. p. 96.]

And to fix a deadline for replacing the carpenters, as follows:

“*Deadline*—By 9 A.M. Monday (September 23) clear out all Carpenters first * * * following which proceed to put on I.A. men to do the work.” [R. p. 97.]

Said Exhibit “D-8” minutes, of the September 23, 1946, meeting the day of the mass lockout of all carpenters, show that the conspirators acted willfully, and with knowledge that they were violating the law [R. pp. 98, 99], as follows:

“*Lawyers said we can't refuse to bargain and told of consequences. Carpenters situation may or may not have been an unfair labor practice, * * **” (Italics ours.)

“Maintenance Men—Metro and some other studios have requested maintenance men to work on sets, and upon refusal have dismissed them. *Alfred Wright stated the studios cannot morally or legally assign maintenance men who never have worked as journeymen on sets to set work.*” (Italics ours.)

Yet the conspiring Major Motion Picture Companies, in disregard of the legal advice of Alfred Wright, used the trick and device previously agreed upon to lay off all maintenance men, and all other carpenter employees, and re-

place them with the IATSE, in the mass lockout that was going on that day, regardless of whether they had ever done the carpenters' work in construction on sets. The conspiracy was against all carpenters, and upon the gamble that they could get by the NLRB:

"Benjamin expressed belief that even though N. L. R. B. might decide Producers had engaged in unfair labor practice *there was a good chance the Board might not assess any back pay.*" (Italics ours.) [R. p. 99.]

Said Exhibit "D-9" minutes of the September 24, 1946, meeting discloses one of the reasons why the conspiring motion picture companies avoided negotiations with the carpenters, and replaced the carpenters with the IATSE. The minutes recite:

"*Producers want an eight-hour day.*" (Italics ours.) [R. p. 102.]

The continuance of said lockout, replacement and contract violations from said September 23, 1946, to and through the enactment of the Taft-Hartley Act and ever since, as alleged in paragraphs XXXV and XXXVI. [R. pp. 23-24.]

The damages in excess of the value of \$3,000, exclusive of interest and costs, as to each of the plaintiffs, and each of the class in whose behalf they sue, as alleged in paragraph I and in an amount that calls for an equitable accounting, alleged in paragraph XXXVIII. [R. pp. 8, 24.]

Second Count.

In addition to the allegations of jurisdiction in paragraph I, and the adoption of paragraphs II to XXXVIII of the first count in its paragraph II [R. p. 26], the second count alleges the facts essential to jurisdiction under Section 303 of the LMRA, and under 28 U. S. Code, Sections 1331 and 1337, as follows:

That said lockout of plaintiffs, and their class, has been continued, and maintained by defendant companies to the present time, under said threats from defendant IATSE, to which threats the defendant employers have yielded in the conspiracy as aforesaid, and by said threats against independent producers who have likewise been compelled to boycott plaintiffs, and their said class, as carpenters, as alleged in paragraph III. [R. p. 26.] That such boycott was with the intent and purpose of enforcing the employer defendants, and said other producers of motion picture companies to employ IATSE members and permittees as carpenters in their respective studios rather than plaintiffs, and their said class, as alleged in paragraph IV. [R. p. 27.]

That on July 3, 1947, after the enactment of said LMRA, plaintiffs, and said class, offered and sought to negotiate and bargain with the employer defendants for the purpose of ending said lockout, and said boycott, that they might resume their work tasks under said collectively bargained agreements, or as said contracts might be extended and modified by negotiations; but that defendants refused to so negotiate and bargain with plaintiffs, and said class, and the defendants have since, and now do continue and maintain said violations of said LMRA, as is alleged in paragraphs V and VI. [R. p. 27.]

That on October 23, 1947, individual members of plaintiffs' class, who were respective employees of defendant employers, filed charges of unfair labor practices against said employer defendants, and also against defendant IATSE, with the National Labor Relations Board; that the charges were referred to a Field Examiner in Los Angeles who displayed partiality as alleged in paragraph VII. [R. pp. 27-28.]

That thereafter, on May 10, 1948, over six months after the charges were filed, it became known to plaintiffs, and their class, that said Field Examiner had been, and was then, a member of the IATSE, as is alleged in paragraph VIII. [R. p. 28.]

That thereupon, on May 14, 1948, said complaining members of plaintiffs' class, by counsel, notified the Chairman of the NLRB, in writing, of said disqualification of the Field Examiner, and of the NLRB officers assigning said charges to him for investigation and report, and that the members of plaintiffs' class could not get a fair and impartial hearing of their charges with the request for the designation of an impartial officer; which request was denied, after which the charges against defendant IATSE were dismissed without a fair hearing thereon, as is alleged in paragraph IX. [R. p. 29.]

That the defendants thereby caused plaintiffs, and their class, to be deprived of their lawful work tasks from and ever since the day of said lockout, and caused them to lose and be deprived of their respective unemployment benefits under the laws of the United States and California, as alleged in paragraph X [R. p. 29], and caused them to be damaged as alleged in paragraphs XXXIX, and XL of the first count. [R. p. 30.]

Third Count.

In addition to the allegations of jurisdiction in paragraph I, and the adoption of paragraphs II to XXXVIII of the first count in its paragraph II [R. p. 30], the third count particularly alleges the facts essential to jurisdiction under Sections 1979 and 1980 of the Revised Statutes, the National Labor Relations Act, as amended, the Labor Management Relations Act and the Social Security Act, and therefore under 28 U. S. Code, Sections 1331 and 1337, as follows:

Right to Collective Bargaining Denied.

That the right to collectively bargain, as granted in Section 7 of the NLRA, and as reenacted in Section 7 of the LMRA, created and vested in plaintiffs, and said class, a civil right under said Section 1980 of the Revised Statutes, guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, as is alleged in paragraph IV. [R. p. 31.]

That defendants rendered ineffectual said civil right to bargain of plaintiffs, and of their class, and deprived them thereof, as is alleged in paragraph V [R. p. 31], and the preceding second count.

Right to Hearing Before Labor Board Denied.

That defendants likewise caused the NLRB to deprive plaintiffs, and said class, of their constitutional and statutory right of a full, fair, open and impartial hearing before the NLRB on said unfair labor practice charges, and to deny action thereon, in violation of the NLRA, as amended, and of the LMRA, and of said Civil Rights Act, Section 1979 (8 U. S. C. 43), as is alleged in paragraph VI. [R. p. 31.]

Right to Hearing Before Unemployment Authorities Denied.

That defendants likewise caused the California Employment Commission to deny certain of plaintiffs, and of their said class, a full, fair, open and impartial hearing before the Department of Employment, its Boards and Officers, upon their respective claims for unemployment and disability benefits, to which they were entitled, and caused them to be deprived thereof in violation of the California Unemployment Insurance Act, as amended, Section 70, and the regulations thereunder, Art. 31, Sections 310 and 315, and in violation of said Civil Rights Act, Section 1980, 8 U. S. C. 47, as alleged in paragraph VII. [R. p. 32.]

That although plaintiffs, and said class, have always been ready, willing and able to bargain with defendants, for the purpose of ending said boycott, and restoring their aforesaid Civil Rights, and have sought so to do, defendants have refused to so bargain with them, as alleged in paragraph VIII [R. p. 32]; to their damage as alleged in paragraphs XXIX and XL of the first count. [R. pp. 25, 32.]

Fourth Count.

In addition to the allegations of jurisdiction under 28 U. S. Code, Section 1343, and the Sherman and Clayton Acts (15 U. S. C., Sections 1, 15), in paragraph I, and the adoption of paragraphs II to XXXVIII of the first count in paragraph II [R. p. 33], the fourth count particularly alleges facts essential to the jurisdiction in anti-trust actions.

Specification of Errors.

Appellants' statement of the points upon which they intend to rely on this appeal [R. p. 198], is as follows:

1. The order of the District Court, dated July 1, 1949, dismissing the above entitled and numbered cause, without leave to amend [R. pp. 144-145], is contrary to law, and not sustained by the record.

2. The Court had jurisdiction:

(a) Under Title 28 U. S. Code Section 1331;

(b) Under Title 28 U. S. Code Section 1337; and

(c) Under Title 28 U. S. Code Section 1343.

3. The Court had jurisdiction under the Fifth and Fourteenth Amendments of the Constitution of the United States.

4. The Court had jurisdiction under the laws of the United States regulating commerce, particularly: The National Labor Relations Act, Section 7, and the other sections thereof, as amended; the Labor-Management Relations Act, 1947, Sections 7, 301 and 303, and the other sections thereof; the Third Civil Rights Act, R. S. 1979, 1980; and the Sherman and Clayton Acts.

5. That upon holding that the Court had no jurisdiction the Court had no power or authority to adjudge that plaintiffs' second amended and supplemental complaint fails to state a claim upon which relief can be granted.

6. That plaintiffs' said complaint, and each count thereof, does state a claim upon which relief should be granted.

Summary.

The defendant motion picture companies were, and are, engaged, and employed plaintiffs and their class. as members of the Brotherhood of Carpenters, Local 946, in interstate commerce.

Plaintiffs, and their class, were employed and worked under the following collectively bargained contracts, which thereby became their own:

PLAINTIFFS' RIGHTS UNDER CARPENTER-IATSE JURISDICTIONAL AGREEMENT.

The Exhibit "A" jurisdictional agreement between the Brotherhood of Carpenters and the IATSE, dated July 9, 1921, which was never terminated, and which by its terms defined the work of the carpenters [R. p. 37] as follows:

"All carpenter work in and around Moving Picture Studios belongs to the carpenters. This includes:

"1. Any and all carpenter work in connection with the Moving Picture Studios, the construction of stages or platforms on which buildings or parts of buildings are to be erected.

"2. All carpenter work in connection with the erection of any building or part of building, from which a picture is to be taken.

"3. The operation of all wood-working machinery in the making of all furniture, fixtures, trim, etc., for use in Motion Picture Studios, belongs to the carpenter."

PLAINTIFFS' RIGHTS UNDER INDUSTRY-WIDE
AGREEMENTS.

The Exhibit "B-1" basic agreement dated November 29, 1926, between the defendant Major Motion Picture Companies and various AFL unions, including both plaintiffs Brotherhood of Carpenters and said IATSE. It set up machinery [R. p. 41]:

To "hear or consider all requests or grievances or other questions affecting wages, hours of labor or working conditions in the studios of the Producers, which have failed of local adjustment, and any other matters as to which such joint consideration will tend to avoid misunderstandings, or will tend to improve the condition of the industry and of its employees."

The Exhibits "B-2" to "B-8" extending, renewing and enlarging upon said Exhibit "B-1" basic agreement, including the "B-6" closed shop agreement of December 8, 1935, the successive agreements on mechanics wage scale and working conditions. All of said agreements were made during the observance of, and therefore in recognition of, said Exhibit "A" jurisdictional agreement. The closed shop agreement provided [R. p. 52]:

"* * * that all employees working under the jurisdiction of the following International Unions would work under closed shop conditions * * *

"Therefore, effective January 2, 1936, every employee in a studio working under the jurisdiction of these above International Unions shall have to carry a card in his respective Union."

All of said Exhibits "B-1" to "B-8," inclusive, were extended to October 13, 1946 [R. p. 54]. Plaintiffs and their class, therefore, as parties to said collectively bargained agreements, were entitled to the work tasks de-

fined for carpenters in the Exhibit "A" agreement, under the closed shop provisions of the Exhibit "B-6" agreement, and upon the six hour day basis of the said agreements on mechanics wage scale and working conditions, when they were locked out en masse, and replaced with the IATSE on September 23, 1946.

PLAINTIFFS' RIGHTS UNDER AFL AWARD AS CLARIFIED.

Plaintiffs, and their class, worked under said Exhibit "A" jurisdictional agreement, and said Exhibits "B-1" to "B-8," inclusive, agreements until the conspiracy between the defendant IATSE and the defendant Major Motion Picture Companies in April, 1945, to replace all carpenters with the IATSE, in violation of said contracts (*supra*, p. 9).

Upon failure of said April, 1945, conspiracy, and upon the AFL condemnation of the illegal practices of the IATSE, plaintiffs, and their class, resumed all of their said work tasks, and continued in the performance thereof until after the December 26, 1945, Exhibit "C-3" AFL Committee award [R. pp. 17-20; *supra*, p. 10].

After said award was issued, and when it became known that its terms were ambiguous, between one provision to follow existing contracts and another provision substituting the terms of a pretended contract which never existed, which substitution was so induced by said secret, false and fraudulent testimony of defendant Walsh, for defendant IATSE, and which substitution was beyond the scope of authority of the AFL Committee: plaintiffs through their unions, the Brotherhood of Carpenters and Local 946, protested the illegal provision in the award. *Said Major Motion Picture Companies also requested a clarification thereof* [R. p. 20].

Thereafter, on August 16, 1946, said AFL Committee issued the Exhibit "C-4" clarification, removing the ambiguity, and validating the award by provisions including the following [R. p. 79]:

"* * * It is to be clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction."

This restored to the carpenters the work tasks that had been wrongfully taken from them by the illegal provisions in said Exhibit "C-3" award, and again gave them the unquestionable right to all carpenters' work defined in the Exhibit "A" jurisdictional agreement, and secured by the Exhibit "B-6" closed shop agreement, and observed through the years.

PLAINTIFFS' RIGHTS UNDER "INTERIM" AGREEMENT.

Pending the issuance of said clarification, plaintiffs, and their class, acting through their said Local 946, entered into the Exhibit "B-9" "Interim" Agreement of July 2, 1946, with the defendant motion picture companies. It was manifestly called an interim agreement because of its contemplation that a formal agreement was to be negotiated, again manifestly in extension, or modification of the said "B-1" to "B-8," inclusive, agreements that had previously been extended to October 13, 1946, as aforesaid.

Particular attention is called to certain provisions in the "interim" agreement [R. pp. 55-60; *supra*, pp. 4, 8], as follows:

It was a "contract for two years" [R. p. 58], and pending negotiations, as hereinafter stated;

It was an agreement for "all crafts going back to work * * *" [R. p. 58];

It provided a six hour day for carpenters, with time and a half for overtime [R. p. 59]; and

It was an agreement for collective bargaining of a formal contract, in that it itself was entered into "*pending the completion of contracts*" * * * "*covering agreements reached and effective pending the formal signing of contracts*" [R. p. 55]; and upon the advance understanding that "*an interim agreement will be entered into pending drawing up formal agreements*" [R. p. 56].

Plaintiffs, and their class, were also employed, and worked under this interim agreement, and thereby became entitled to all rights thereunder, on the September 23, 1946, date of the lockout, thereafter for the two year period to July 1, 1948, and thereafter pending *bona fide* negotiations of a formal contract.

VIOLATION OF CONTRACTS AND UNLAWFUL ACTS BY IATSE IN UNLAWFUL THREATS AND DEMANDS.

Defendant IATSE, acting through defendant Walsh, thereupon violated said Exhibits "A" and "B-1" to "B-8," inclusive, collectively bargained contracts, by its repudiation of said AFL Exhibit "C-4" clarification, and unlawful demands that defendant motion picture companies follow the illegal and void provisions of the Exhibit "C-3" award, which said Walsh had so fraudulently induced, *or else "have all work stopped in studios, exchanges and theatres"* [R. p. 81].

In said threats and demands defendant IATSE reverted to its pattern of unlawful operations, as is shown in the reported opinion in *Loew's, Incorporated, v. Basson*, 46 Fed. Supp. 66, excerpts from which are hereinafter quoted [*Infra*, p. 46].

VIOLATION OF CONTRACTS BY DEFENDANT MOTION PICTURE COMPANIES, IN CONSPIRACY WITH THE IATSE.

Instead of resisting said unlawful threats and demands of the IATSE, as defendant Loew's, Incorporated, had successfully done in said case of *Loew's, Incorporated v. Basson*, the defendant companies submitted to said threats, yielded to said demands, and embraced said IATSE in conspiracy, in the following particulars:

In the false pretense that the defendant companies were caught between the carpenters and the IATSE in a trade dispute (*supra*, p. 12);

In the fraudulent agreement to lay off all carpenter employees and replace them with the IATSE (*supra*, pp. 13, 14), to which end "*it was agreed each studio would assign work to carpenters by Monday to create an incident* (*supra*, p. 15);

To likewise force the Independent Motion Picture Companies to replace carpenters with the IATSE (*supra*, p. 16), in contemplation of substituting an eight hour day for the carpenters' contractual six hour day (*supra*, pp. 16, 18);

In the agreement "*to put I.A. men on sets so carpenters * * * will quit*"; in a discussion of "*the proper method of procedure—how and when to get carpenters * * * to refuse to work—when to replace with I.A., etc.*"; with the agreement that "*there is to be no hurry to clean out all carpenters* (*supra*, p. 16);

To avoid negotiations with the carpenters (*supra*, pp. 16, 17), knowing that it would be an unfair labor practice (*supra*, p. 18);

To set a uniform deadline for 9 a.m. Monday, September 23, 1946, to "*clear out all carpenters first * * * following which proceed to put on I.A. men to do the work*" (*supra*, p. 17);

To assign maintenance carpenters to a type of work they had never performed, although counsel advised them that "*the studios cannot morally or legally assign maintenance men who never have worked as journeymen on sets to set work*" (*supra*, p. 17);

To proceed with their unfair labor practices upon the "*chance the Board might not assess any back pay*" (*supra*, p. 18);

With the declared motive that "*Producers want an eight hour day*" (*supra*, p. 18); and

In the fraudulent agreement, one week in advance of the lockout, to make the false representations to the State Employment Department that the victimized and aggrieved carpenters had each "left his work on account of a trade dispute," and to ask the Department to disqualify him for unemployment compensation" (*supra*, p. 15).

THE CONTINUOUS AND CONTINUING WRONGS COMMITTED BY THE CONSPIRING DEFENDANTS.

The mass lockout, the mass replacement of carpenters with the IATSE, the avoidance of collective bargaining with the carpenters, the false representations to the State Unemployment Authorities, and the avoidance of an accounting before the National Labor Relations Board, and the violations of the Sherman and Clayton Acts have continued to the present day, to the damage of the plaintiffs, and their class, as they allege and pray.

ARGUMENT.

Each of the following points is made both for appellants and in the public interest.

POINT I.

Plaintiffs, and Said Class for Whom They Sue, Each as Individual Employees, Became Parties to Said Collectively Bargained Contracts When They Accepted Employment and Worked Thereunder; and Each Had a Right of Action for the Violation Thereof, Before the Enactment of the Labor Management Relations Act.

The memorandum opinion of the District Court correctly states that jurisdiction exists for parties to the contracts, but erroneously excludes individual employees as parties thereto [R. p. 138], as follows:

“The legislative history indicates to me beyond dispute that the intention of Congress by Section 301 was to provide a forum, other than the street, for settlement of asserted violations of labor contracts by law suits, the parties to which could only be the parties to the contract involved, *i. e.*, either the employer or the *labor organization*: And that it was intended that the *labor organization alone could speak as a party to the suit on behalf of the employees it represented as a party to the contract.*” (Italics ours.)

1. THE COURT ERRED IN ASSUMING THAT PLAINTIFFS, AND THEIR CLASS, WERE NOT PARTIES TO THE COLLECTIVELY BARGAINED CONTRACTS, BECAUSE EACH OF THEM BECAME PARTIES THERETO WHEN THEY ACCEPTED EMPLOYMENT AND WORKED THEREUNDER.

Reference is made to the allegations in paragraphs VI, XIII and XVIII [R. pp. 11, 13, 15], that plaintiffs, and the class for whom they sue, were employed, or eligible for employment, by the defendant motion picture companies, and that they are now eligible for employment in said work tasks, under said collectively bargained contracts.

Attention is called to the fact that under said contracts the membership of said Local 946 constituted a pool of carpenters subject to the call of said defendant companies as need required, with the seniority right of being called, if and when additional carpenters, *or replacements*, should be needed.

The said collective bargaining contracts had been accepted by all of the members of Local 946, who had worked thereunder at one time or another, and, therefore, the class is not restricted to those particular members who were working on the day of the lockout.

Yazoo & M. V. R. Co. v. Webb (5th Cir.; April 1933), 64 F. 2d 902, at 903:

“An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of strike or lockout resembles in many ways a treaty. As a safeguard of social peace it ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims

and ought on both sides to be kept faithfully and without subterfuge. In no other way can confidence and industrial harmony be sustained.” (Italics ours.)

“But in itself it can rarely be a subject of court action because it is incomplete. It establishes no concrete contract between the employer and any employee. No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer to be closed by specific acceptances.” (Italics ours.)

“When negotiated by representatives of an organization it is called collective bargaining, but ordinarily the laws of the organization, which constitute the authority of the representatives to act, do not require the individual members to serve under it, but only that if they serve they will do so under its terms and will join in maintaining them as applied to others.” (Italics ours.)

“When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed.” (Italics ours.)

“Ordinarily, as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer having the right to discharge at any time and the employee having the right to quit. But the employment though indefinite as to time is a relationship while it lasts, and is subject to the conditions fixed in the working agreement for the industry.” (Italics ours.)

“Thus a worker cannot be discharged for causes prohibited by the agreement or without a hearing if that is provided, and the agreed seniorities must be observed in promoting, laying off, or re-employing men.” (Italics ours.)

The *Yazoo* case has been followed, in the statement of law above quoted, since the enactment of the NLRA.

2. THE COURT ERRED, THEREFORE, IN SAID CONCLUSION “THAT THE LABOR ORGANIZATION ALONE COULD SPEAK AS A PARTY TO THE SUIT ON BEHALF OF THE EMPLOYEES IT REPRESENTED AS A PARTY TO THE CONTRACT.”

Gatliff Coal Co. v. Cox (6 Cir., 1944), 142 F. 2d 876, was an action, by an individual employee, for wages due him “under a bargain contract between the Southern Appalachian Coal Operators’ Association and District 19, United Mine Workers of America” (p. 878). The case was transferred to the Federal Court “on the ground of diversity of citizenship * * *.” In the Federal Court the defendant employer pled that there was no cause of action (p. 879), as follows:

“Appellant alleged in paragraph 1 of its answer that the court was without jurisdiction of the subject matter of appellee’s cause because appellee had no justiciable rights under the bargaining agreement between the coal operators’ association and the labor organization * * *.”

At 880, the Court reaffirms the law as stated in the *Yazoo* case, in the following language:

“By itself, the collective agreement constitutes no contract between the individual employee and the com-

pany which employs him. It is only an understanding as to the terms on which a contract of employment may be satisfactorily made and carried out. It is a mutual, general offer to be closed by acceptance. When the collective agreement is signed by the individual members of the employers' association and the collective bargaining agent of the labor organization, no other contract being shown, it becomes, until abrogated, the rule of the individual employer and any person who thereafter continues in the employment of the employer or takes new employment with him becomes entitled to all the benefits of the collective agreement and incurs all of its obligations."

And continues with the following statement that is particularly applicable here:

"Since appellee was employed by appellant at the time the collective agreement was entered into between the Southern Appalachian Coal Operators' Association and District No. 19, United Mine Workers of America and he thereafter continued in the employ of appellant and there being no showing that he made any individual contract conflicting with the collective agreement, appellee's rights arising out of his employment by appellant and the wages due him, if any, must be measured by the collective agreement. Appellee had the right under the circumstances here appearing to maintain the present action." (Italics ours.)

The employees speak for themselves in this case, and through the union in appeal No. 12345.

POINT II.

Both Sections 301 and 303 of the Labor Management Relations Act Are Constitutional; Both Created Federal Rights and Rights of Action; and Both Vested Jurisdiction in the Federal Courts in Cases Arising Thereunder.

Colonial Hardwood Flooring Co., Inc. v. International Union, 76 Fed. Supp 493, like the present case dealt with two counts, under Sections 301 and 303, respectively, and at page 494, states:

“The complaint in this case is in two counts. Count 1 is based on section 301 of the recent Act of Congress known as the Labor Management Relations Act,
* * *

“Section 301(a) authorizes suits for violation of contracts between employer and the labor organization representing employees * * *.

“The complaint alleged that contrary to the express provision of the contract on or about October 3, 1947, the defendants caused a strike or stoppage of work at the plaintiff’s furniture plant in consequence of which it sustained substantial damages.”

And at 495:

“Count 2 of the complaint is based on section 303 of the Labor Management Relations Act, 29 U. S. C. A. Sec. 187, which, shortly stated, prohibits secondary boycotts. The count alleges the occurrence of a secondary boycott by the defendants with consequent substantial damage to the plaintiff’s business
* * *.

“* * * The defendants separately have filed motions to dismiss the complaint on many separate grounds. They will be considered separately and briefly at this time.”

And at 496:

“(5) The defendants also raise various constitutional questions. First it is said that the court is without jurisdiction of the case in the absence of diversity of citizenship. * * * The Labor Management Act creates important substantive rights between employers and employees engaged in interstate commerce, and section 301 expressly authorizes suits of this character in district courts of the United States. It is clearly, therefore, a suit arising under a law of the United States.

“(6) The constitutionality of section 301 is also challenged on the ground that it violates the due process clause of the Fifth Amendment in its alleged retrospective operation on contracts existing prior to the passage of the Act. But in my opinion the Act is prospective and not retrospective in character. It is not retrospective merely because it gives additional remedies for the future breach of then existing contracts.

“(7) The same constitutional objection is urged as to section 303 of the Act but is equally untenable, at this stage of the case.”

Attention is called to the fact that plaintiffs' cause of action, as alleged in the first count, is not retrospective, but is based upon a violation of the collectively bargained contracts, a violation that continued after the enactment of the Labor Management Relations Act, and that still continues.

International Union United Furniture Workers of America, et al. v. Colonial Hardwood Flooring Co., Inc., 168 F. 2d 33, affirms the foregoing District Court ruling.

Having shown that Sections 301 and 303 are constitutional, and that actions may be maintained under each in a single suit, jurisdiction under both in this case will now be shown.

POINT III.

Said Section 301(a) of the Labor Management Relations Act Gives Plaintiffs, and Said Class, a Substantive Federal Right of Action, Based Upon the Continued Violation of Said Contracts, as Alleged in the First Count; and Vests Jurisdiction in the Federal Court Without Diversity of Citizenship.

The memorandum opinion of the District Court states a conclusion to the contrary [R. p. 139]:

“I conclude, therefore, that Section 301 does not give the plaintiffs as individual members of a union the right to sue in asserted violation of the contracts involved, whether their union was or was not a direct party to such contracts.”

Reference is made to the abstract and statement of the first count in the complaint (*supra*, pp. 7-18), and to the summary (*supra*, pp. 24-30).

1. THE COURT ERRED IN ITS CONCLUSION DENYING THIS JURISDICTION, BECAUSE THE ACT IS WRITTEN PRIMARILY FOR EMPLOYEES, AND SECONDARILY FOR THEIR LABOR ORGANIZATIONS.

“*Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.*” (Italics ours.)

The italicized words show that the section relates to collectively bargained contracts negotiated by “a labor or-

ganization representing employees,” meaning, of course, for employees. This is the intent of the Act.

“Section 1(b). * * *

“It is the purpose and policy of this Act, * * * to prescribe the legitimate rights of both *employees* and employers * * * to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the others, to protest the rights of *individual employees* in their relations with labor organizations * * *.” (Italics ours.)

“Sec. 7. *Employees* shall have the right * * * to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *.” (Italics ours.)

“Sec. 8(a). It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 7;”. (Italics ours.)

2. THE COURT ERRED IN SO DENYING JURISDICTION UNDER SECTION 301(a), BECAUSE CONGRESS, “HAVING CREATED A SUBSTANTIVE RIGHT,” COULD AND DID “ALSO PROVIDE THE PROCEDURE FOR ENFORCING THAT RIGHT.”

The above quoted language is taken from the following well considered case.

Wilson & Co., Inc. v. United Packing House Workers, 83 Fed. Supp. 162, at 163:

“Action by Wilson & Company, Inc., against United Packinghouse Workers of America, *a labor*

*organization affiliated with the Congress of Industrial Organizations, * * * for damages for breach of collective bargaining contracts, wherein the United States intervened. On motion by defendant unions to dismiss for want of jurisdiction. Motion denied.”* (Italics ours.)

And at 164:

“Plaintiff alleges that it is engaged in a business affecting commerce and that the defendants are labor organizations and voluntary unincorporated associations representing employees in an industry affecting commerce and have officers and agents engaged in such representation in this district. *The defendants are alleged to have breached the terms of the agreement* by causing strikes and work stoppages in March of 1948 in certain of plaintiff’s plants located in New York.” (Italics ours.)

“*Jurisdiction is invoked under Section 301(a) of the Labor Management Relations Act, 1947, * * * and under 28 U. S. C. A. Sec. 1337, which provides that ‘the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *.’*” (Italics ours.)

“(1) *First. It is contended by defendants that Section 301(a) is unconstitutional as applied to this case, * * *.*

“Defendants argue that the action is one for breach of contract, to enforce a right existing under the common law of the State of New York; that there is no diversity of citizenship, and the case is not one arising under the Constitution or laws of the United States or upon any other ground set forth in Article III, Section 2 of the Constitution. Consequently, runs the argument, Congress was without power to

confer jurisdiction over the case on the District Court. (Citing cases.) *The argument must fail.*" (Italics ours.)

And at 165:

"* * * Section 301 (a) of the Act, authorizing suits for violation of such agreements, would be meaningless on any other hypothesis and would attribute to Congress the anomalous action of providing for remedy and a forum in which to enforce it, without creating a right to remedy or to enforce. The very inclusion of Section 301 shows, on its face, and the legislative history of the Act confirms the Congressional intention, that other provisions of the Act, for redressing unfair labor practices, were not an exclusive statement of the rights created by the Act, and did not eliminate or militate against the right to seek relief in the federal courts for violations of collective bargaining agreements between employers and labor organizations."

"* * * *The Labor Management Act creates important substantive rights* between employers and employees engaged in interstate commerce, and section 301 expressly authorizes suits of this character in district courts of the United States. It is clearly, therefore, a suit arising under a law of the United States." (Italics ours.)

And at 166:

"* * * In view of the fact that the enforcement of a federal right is involved in the instant case, the argument falls. It is clear that *Congress, having created a substantive right* in the exercise of its power under the commerce clause, art. 1, sec. 8, Cl. 3, *may also provide the procedure for enforcing that right by making voluntary labor organizations legal entities for the purpose of suit.* *United Mine Work-*

ers of America v. Coronado Coal Co., 259 U. S. 344, 383-392, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; *cf.* Rule 17(b) of the Federal Rules of Civil Procedure. Insofar as state laws may conflict, they must yield to the paramount congressional legislation when a federal right is asserted as the basis of suit.” (Italics ours.)

There is nothing novel in the provisions of Section 301(a) dispensing with diversity of citizenship, as a jurisdictional requirement in cases arising under said section. The requirement of diversity was dispensed with in the Sherman and Clayton Acts, and in various other federal statutes. *That is also the purpose of 28 U. S. Code, Sec. 1337.*

3. DEFENDANT ASSOCIATION IS AN EMPLOYER WITHIN THE MEANING OF THE ACT, AND UNDER THE ALLEGATIONS OF THE COMPLAINT.

In the Matter of Association of Motion Picture Producers, Inc., et al. (each of the defendant motion picture companies), 79 Dec. NLRB 466, at 480:

“A. *Is the Association an employer within the meaning of the Act?*

“The Act defines an employer to include ‘any person acting in the interest of an employer, directly or indirectly . . .’ In a companion Intermediate Report dated March 20, 1947, issued by the undersigned, the question of whether the Association was an employer within the meaning of the Act arose and it was there answered in the affirmative. The record herein presenting the same basic facts, is even more persuasive and leads to the same conclusion.”

4. ALL THE CONSPIRING DEFENDANTS ARE
LIABLE.

Allen Bradley Co. v. Local Union 3, International Brotherhood of Electrical Workers, et al., 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939.

5. SECTION 301(a) GIVES JURISDICTION IN THIS SUIT BROUGHT BY PLAINTIFFS, AND SECTION 301(b) GIVES JURISDICTION IN SUIT NO. 12345, BROUGHT BY THE LOCAL UNION FOR, AND AS REPRESENTATIVE OF, ITS MEMBERS, WITHOUT CONFLICT BETWEEN THE TWO SUITS, AS JURISDICTION LIES IN EITHER OR BOTH.

The United Steel Workers of America and its members did join as plaintiffs, and the motion to dismiss their complaint was denied as to both, in the following case in the District Court for the Western District of Michigan, Southern Division, where the opinion was rendered and decision made on February 14, 1949.

United Steel Workers of America, et al. v. Shakespeare Co., et al., 84 Fed. Supp. Adv. 267:

“Action by United Steel Workers of America (U. S. A.-C. I. O.), and others (later identified as members) against the Shakespeare Company and others for a judgment determining rights of parties under a collective bargaining agreement, for a determination that defendants had wrongfully terminated the agreement and for damages. On motion to dismiss the complaint. Motion denied.” (Italics ours.)

And at 269:

“The strained relations between these parties continued, and on November 16, 1948, plaintiff union and representatives and members of the union filed

complaint against defendants in the present suit. *They allege, among other things, that the collective-bargaining agreement of July 16, 1947, had not been legally terminated by defendants * * *.*" (Italics ours.)

And at 270:

"(1) It should be kept in mind that in their amended complaint *plaintiffs do not ask for injunctive relief* against so-called unfair labor practices or for any other form of injunctive relief. *They ask only for a determination of their rights under the collective-bargaining agreement in question and for a determination of their damages* claimed to have been sustained as a result of defendants' alleged violation of the agreement. (Italics ours.) Plaintiffs' amended complaint and their claim of jurisdiction are based on Title III, Sec. 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. A. Sec. 185(a),
* * *

"*The defendants cite and rely upon the cases of Amazon Cotton Mill Co. v. Textile Workers Union, 4 Cir., 167 F. 2d 183, and International Longshoremen's & Warehousemen's Union v. Sunset Line & Twine Co., D. C. 77 F. Supp. 119, as supporting their contention that this court is without jurisdiction of the present case. However, in those cases the plaintiffs asked for injunctive relief, and the courts correctly held that proceedings to enjoin unfair labor practices were within the exclusive jurisdiction of the National Labor Relations Board, and that a Federal district court did not have jurisdiction to enjoin unfair labor practices. Furthermore, those cases did not involve alleged violation of collective-bargaining agreements and, therefore, were not within the purview of Section 301(a) of the Labor Manage-*

ment Relations Act. The theory on which those cases were based, and the factual situations involved, clearly distinguish them from the present case.” (*Italics ours.*)

And at 271 :

“It is elementary that in considering a motion to dismiss the court must assume the truth of all material and well-pleaded allegations of fact. The amended complaint alleged numerous acts of violation of the collective-bargaining agreement by defendants prior to October 9, 1948, and, assuming the truth of those allegations, the court concludes that the amended complaint states a claim upon which relief could be granted.”

And at 272:

“In summary, the court concludes:

“(1) That it has jurisdiction of the matters alleged in plaintiffs’ amended complaint; and

“(2) That, assuming the truth of all material and well-pleaded allegations of fact, the amended complaint states a claim upon which relief could be granted.

“Defendants’ motion to dismiss the amended complaint is accordingly denied.”

It is submitted, therefore, that the only issues under Sections 301 and 303 are whether plaintiffs’ first and second counts qualify under them, respectively.

POINT IV.

Said Section 303 of the Labor Management Relations Act Gives Plaintiffs, and Said Class, a Substantive Federal Right of Action, Based Upon the Continued Acts of the Conspiring Defendants, as Alleged in the Second Count, and Vests Jurisdiction in the Federal Court Without Diversity of Citizenship.

The memorandum opinion of the District Court states a conclusion to the contrary [R. p. 140], as follows:

“Without determining whether or not the plaintiffs could be proper party plaintiffs in any action against the I.A.T.S.E. in this or any other court, *i.e.*, if they could state a cause of action for violation of Sec. 303 (a), it seems clear to me that this court was not granted jurisdiction.”

1. DEFENDANT IATSE, AND ITS OFFICERS, OPERATE ON A PATTERN OF AGGRESSION THAT IS UNLAWFUL.

The IATSE pattern of aggression was held illegal before the enactment of the Labor Management Relations Act, in a suit brought by Loew's, Incorporated, for itself and other Major Motion Picture Companies.

Loew's, Incorporated v. Basson, et al., including IATSE locals (*supra*, p. 28), recites the IATSE pattern of unlawful demands (p. 69), as follows:

“The complaint further alleges that on December 11, 1941, referring to a proposed new contract between plaintiff and Local 306 with respect to the projection men employed at plaintiff's New York exchange and home office, defendant Local 306, by its attorney, wrote plaintiff a letter which stated in part:

“* * * Local 306, is requesting that the collective agreement, to be executed between our respective clients, shall provide, among other satisfactory conditions of employment, such as wages, hours, working conditions, and term of contract, the following clauses in substance:

“‘1. Employer agrees to supply, rent, lease, sell, deliver, license, distribute or provide films in the City of Greater New York only to such exhibitors as employ and continue to employ solely members of Local 306 as projectionists, and the Employer agrees not to supply, rent, lease, sell, deliver, license, distribute or provide film to any exhibitor in the City of Greater New York not employing members of Local 306.

“‘2. Members of Local 306 shall not be required, directly or indirectly, to work with, handle or work upon film, which was not or is not to be handled, transported and projected in the City of Greater New York, solely by members of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, or its subsidiary locals, or the members of such union as is approved by the International Alliance, and which is recognized by one of the Central Organizations with which Local 306 is affiliated.

“‘3. * * * Employer further agrees that the agency which delivers the film shall not be re-required to deliver and need not deliver film to any exhibitor within the City of Greater New York who does not employ and continue to employ as projectionists solely members of Local 306.

“‘4. Employer agrees that film bearing the label of the International Alliance will be supplied for exhibition in the City of Greater New York only to such exhibitors as employ and continue to employ as projectionists solely members of Local 306.”

And recites the unlawful pattern of threats, at page 69, as follows:

“The complaint then alleges that at conferences between representatives of plaintiff and Local 306, plaintiff was told that it must immediately comply with the terms and conditions set forth in the letter of December 11, 1941 or else Local 306 would immediately call out on strike its members who are employed as projectionists in plaintiff’s home office and New York film exchange, and upon the request of Local 306, to be made immediately, ‘IATSE’ will call out on strike all the members of Local 306 who are employed as projectionists in plaintiff’s sixty-five theatres in Greater New York City, all members of Local B 51 employed in plaintiff’s New York exchange and all members of any affiliated unions of ‘IATSE’ who are employed in plaintiff’s studio at Culver City, California.”

And recites the relief then sought by Loew’s, Inc., at page 69, as follows:

“The complaint seeks a declaratory judgment * * * ; (a) that the demands of the defendants are illegal and contrary to law and compliance therewith by plaintiff is prohibited by law; (b) that in making these demands, defendant is not, and in enforcing said demands by strikes or other means of economic compulsion, defendant would not be a person participating in a labor dispute within the meaning of the Norris-LaGuardia Act, * * * ; (c) that a contract between plaintiff and defendant which would include the terms and conditions set forth in defendant’s letter of December 11, 1941, would be a contract in restraint of trade in violation of the Sherman Anti-Trust Act, * * * Sec. 1; (d) that compliance with defendant’s demand would be a violation of the con-

sent decree in *United States v. Paramount Pictures Inc.* and (e) that if all of the distributors would comply with defendant's demands, a conspiracy would result which would constitute a violation of the Sherman Anti-Trust Act, * * *. The complaint also seeks a permanent injunction enjoining the defendant from taking any steps to call strikes and inducing 'IATSE' to call strikes."

And the Court's ruling on the IATSE motion to dismiss, at page 72 as follows:

"Accordingly, defendant's motion is denied in all respects, * * *."

The foregoing quotations show the IATSE pattern, to make unlawful demands, and to force said unlawful demands by illegal threats, so as to induce employers into conspiracy and fraud.

2. SECTION 303(a) MAKES SAID IATSE PATTERN OF AGGRESSION UNLAWFUL, UNDER THE FACTS IN THIS CASE.

"Sec. 303. (a) *It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—*

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor

*organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *.*" (Italics ours.)

It has been shown, under Point II, that this Section 303(a) is constitutional, and that it creates a substantive federal right in aggrieved parties (*supra*, p. 36).

Colonial Hardwood Flooring Co., Inc. v. International Union (*supra*, p. 36), as affirmed in *International Union, etc.* (*supra*, p. 37).

In substance and effect said, Section 303(a) provides that "it shall be unlawful," in this industry "affecting commerce," for the IATSE to "encourage" IATSE member "employees of" the defendant companies to "engage in a strike or a concerted refusal in the course of their employment," in other capacities, "to use * * * or otherwise handle or work on any" motion pictures produced by defendants, with the "object" of "forcing or requiring" said picture company employers "to assign" work tasks, belonging to the carpenters, under said collectively bargained contracts, to IATSE member employees, in mass replacement of the carpenters.

This section does not require that the offending IATSE shall have caused its members to strike. An actual strike is not essential. The offense was for the IATSE to "encourage" its members "to strike" or to "encourage" them to enter in "a concerted refusal" to use or handle motion picture products of the defendant employers.

The IATSE did "encourage" its members "to strike," and did "encourage" its members to join in "a concerted refusal" to handle or work on the defendant employers'

product in motion pictures, by its threat to "have all work stopped in the studios, exchanges and theatres" of the defendant companies. (*Supra*, p. 11.)

It was by said means that the defendant IATSE, and its officers, induced the defendant motion picture companies, and Association, to join in the conspiracy and fraud culminating in the September 23, 1946, mass lock-out of all carpenter employees, and replacement of them in their contractual work tasks with the IATSE.

It has been shown that said lockout and replacement, under said threats and demands, and in said conspiracy, continued after the enactment of the Labor Management Act, and still continues as a result of the continuing unlawful acts of defendant IATSE.

3. SECTION 303(b) PROVIDES THE FEDERAL REMEDY, WITHOUT DIVERSITY OF CITIZENSHIP, TO ENFORCE THE FEDERAL SUBSTANTIVE RIGHT CREATED BY SAID SECTION 303(a).

It has been shown under Point II, that this Section 303(b) is constitutional.

Colonial Hardwood Flooring Co. v. International Union United Furniture Workers of America, et al., there cited (*supra*, p. 36), was a federal court action *without diversity of citizenship*. At page 494 the opinion states:

"The plaintiff is a Maryland corporation engaged in the manufacture of woodwork in the City of Hagerstown, Maryland * * *. The other defendant, United Furniture Workers of America, Local 472, is a local Union having its principal business offices at Hagerstown, Maryland."

One count in this *Colonial* suit, as in the present case, was brought under said Section 303 (p. 495):

“Count 2 of the complaint is based on section 303 of the Labor Management Relations Act, 29 U. S. C. A., Sec. 187, which, shortly stated, prohibits secondary boycotts. The count alleges the occurrence of a secondary boycott by the defendants with consequent substantial damage to the plaintiff’s business.”

which the defendants there also moved to dismiss (p. 495):

“* * * The defendants separately have filed motions to dismiss the complaint on many separate grounds. They will be considered separately and briefly at this time.”

All motions were denied. The fact that this district court decision was affirmed (*supra*, p. 37), in an opinion written by Circuit Judge Parker, carries weight.

4. SAID DECISION IN THE COLONIAL HARDWOOD CASE, UPHOLDING FEDERAL COURT JURISDICTION WITHOUT DIVERSITY OF CITIZENSHIP, IS SUPPORTED BY THE ONLY SOUND CONSTRUCTION THAT CAN BE GIVEN THE LANGUAGE OF SECTION 303(b).

“Whoever” includes plaintiffs and their class.

New Standard Unabridged Dictionary:

“Whoever, Any one, without exception; any person who; no matter who; as, high or low, whoever violates this law shall be punished.”

“Whoever shall be injured in his business or property” includes plaintiffs, and their class, whose work in their said employment was business, and whose rights to their work tasks under said collectively bargained contracts is property.

Nissen v. International Brotherhood of Teamsters, etc., et al., 229 Iowa 1028, 295 N. W. 858, 141 A. L. R. 598, at page 614:

“* * * their rights under this contract with their employer were valuable property rights of which they were wrongfully deprived by the acts of the defendants. Such rights are guaranteed by the Fifth Amendment of the Federal Constitution. *Cameron v. International Alliance, etc.*, 118 N. J. Eq. 11, 176 A. 692, 696, 97 A. L. R. 594. ‘There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.’ ”

Schneider v. Duer, et al., 170 Md. 326, 184 Atl. 914, at 919:

“The right to engage in useful and productive labor is common to all men, *Dasch v. Jackson (Md.)*, 183 A. 534, 538, and in a constitutional sense is property of which one may not be deprived except by due process of law. * * *

Carroll, et al. v. Local No. 269, International Brotherhood of Electrical Workers, et al., 133 N. J. Eq. 144, 31 A. 2d 223, at 224:

“It is not inappropriate, however, to remark that the right to earn a livelihood is a property right which is guaranteed in our country by the fifth and fourteenth amendments of the federal constitution, * * *.”

Bautista v. Jones, 25 Cal. 2d 746, at 749:

“The right to work, either in employment or independent business, is fundamental and, no doubt,

enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment to the federal Constitution, as well as the more specific provisions of our state Constitution. * * *

This is the settled rule in the federal courts.

Roseland v. Phister Mfg. Co., 125 F. 2d 417 (139 A. L. R. 1013), at 419:

*"The language of the statute (Clayton Act, Sec. 4; 15 U. S. C. 15) * * * includes any person who shall be injured in his business or property. * * ** In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention, and labor of men for the purpose of livelihood or profit,—persistent human efforts which have for their end pecuniary reward. It denotes 'the employment or occupation in which a person is engaged to procure a living.' *Allen v. Commonwealth*, 188 Mass. 59, 74 N. E. 287, 288, 69 L. R. A. 599." (Italics ours.)

The language of Section 303(b) is manifestly taken from the language in the Clayton Act, so that the same rule necessarily applies. (*Infra.*)

"Whoever shall be injured * * * may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy" places no restriction upon plaintiffs' jurisdiction in this case for two reasons:

(a) Because plaintiffs, and their class, have jurisdiction in the federal court under Section 301 (*supra*, pp. 31, 36, 38); and

(b) Because the language of Section 303(b) is taken from Section 4 of the Clayton Act, 15 U. S. C. 15, as above stated, and as is shown by said section, as follows:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” (Italics ours.)

The District Court, therefore, has jurisdiction under Section 303(b) of this Act (29 U. S. C. A. 187(b)) like it has under Section 4 of the Clayton Act (15 U. S. C. A. 15). Furthermore, both jurisdictions are covered by 28 U. S. Code 1337.

5. THERE IS NO QUESTION OF PLAINTIFFS’ RIGHT TO SUE, AS INDIVIDUALS, UNDER SECTION 303.

In re Parks-Belk Company of Elizabethtown (Elizabethtown, Tenn.) and *Retail Clerks International Association* (AFL). Case No. 10-RC-25, April 30, 1948 (77 NLRB No. 71), 22 LRRM 1036:

“At the hearing the Employer filed a ‘Motion to Dismiss Petition’ alleging as the ground for dismissal that the Petitioner was engaged in boycotting the Employer in violation of Section 303 of the Act, as amended. This motion was referred to the Board.
* * * To the extent that the alleged boycott is, as the Employer contends, a violation of Section 303 of the Labor Management Relations Act, 1947, the remedy provided in that section for individuals injured by violations thereof is a suit for damages in the federal courts. Accordingly, we shall deny the Employer’s motion.”

POINT V.

The United States District Court Also Has Jurisdiction of the First Count Under Judicial Code Section 24(1), 28 U. S. C. A. 41 (1), 28 U. S. Code 1331, Because the Conspiring Defendants Violated, and Continue to Violate, Every Provision of Section 7, and Related Sections, of the Wagner Act as Re-enacted in the Taft-Hartley Act.

The memorandum opinion of the District Court states a conclusion to the contrary [R. p. 136], as follows:

“The deprivation of the right to bargain collectively is an unfair labor practice (29 U. S. C. 158(a) (1); Sec. 8 Wagner Act; *id.* Taft-Hartley Act). The exclusive power to prevent unfair labor practices is given to the Board (29 U. S. C. 160,(a)); Section 10 Wagner Act; *id.* Taft-Hartley Act), and right of review lies not in this Court, but in United States Court of Appeals, (*id.* subdivision (22)). See *Amalgamated Workers v. Edison*, 309 U. S. 261; *Amazon Mill Co. v. Textile Workers Union*, 167 Fed. (2) 183, C. C. A.; *United, etc. v. International, etc.*, 115 Fed. (2) 488. This leads to the conclusion that the plaintiffs have in fact by said additional allegations, removed any doubt as to the lack of jurisdiction of this court as to the first asserted cause of action, unless plaintiffs right to sue in this court exists under either Section 301 or 303(b) of the Taft-Hartley Act.”

28 U. S. Code 1331:

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.”

The jurisdictional amount or value in controversy is alleged [R. p. 8] as follows:

“I. That the matter in controversy herein, being the right to bargain collectively under Sec. 7 of the National Labor Relations Act as re-enacted in Sec. 7 of the Labor-Management Relations Act of 1947 and the right to work for wages, and the right to wages, and damages for the deprivation of said right to collectively bargain, which exceeds the value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, as to each of plaintiffs, and each of the class in whose behalf they sue.”

The equitable character of the action is alleged as [R. p. 25] follows:

“XXXIX. That the exact amount of the damages due the plaintiffs, and the members of said class as aforesaid, is not known to them; that the records which would disclose the same are now, and at all times have been, in the exclusive possession and control of the defendants, or some of them; and that accordingly the amount thereof cannot be ascertained except by an accounting to be had pursuant to the order of this Court.”

The prayer, among other things, is for an accounting and damages [R. p. 35].

The test of jurisdiction under this section is stated in *Gully v. First National Bank*, 299 U. S. 109 (57 S. C. 96, 81 L. Ed. 70), at 112, as follows:

“How and when a case arises ‘under the Constitution or laws of the United States’ has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or im-

munity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Citing cases.) *The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.*" (Italics ours.)

**1. DEFENDANTS VIOLATED EVERY PROVISION OF
SECTION 7.**

Sec. 7 (29 U. S. C. 157):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

The conspiring defendants violated said section in every possible way, by interfering with the right of plaintiffs and said class: (a) To self-organization; (b) To maintain their self-organization in their own Brotherhood of Carpenters and Local 946; (c) To bargain collectively; (d) To bargain collectively through their own said Brotherhood and Local as the recognized representatives of their own choosing; and (e) To engage in concerted activities, in their own Brotherhood and Local, for the purpose of collective bargaining, and also for the purpose of maintaining their mutual aid and protection, through their own said Brotherhood and Local, among other things, from the very aggressions, conspiracy and frauds in the continuing mass lockout and replacement complained of in this case.

Said violations of Section 7, by defendants, were fraudulently conceived, intended and carried out, to divorce plaintiffs, and their class, from their own union, and to subordinate them to the IATSE, not alone to gratify the illegal IATSE demands, but also to benefit the co-conspiring defendant companies, and Association, by stripping plaintiffs, and their class, of their contractual six hour day, with time and a half for overtime [*supra*, pp. 8, 28], and by substituting an eight hour day therefore [*supra*, pp. 16, 18].

2. THE USE OF THE FICTITIOUS IMPASSE, BY THE CONSPIRING DEFENDANTS, WAS IN VIOLATION OF SECTION 7.

The pretense of an impasse is shown in the Exhibit “D-2” minutes of defendant Producers Labor Committee, as quoted in the statement of the case [*supra*, p. 12].

The refusal to bargain is shown in the Exhibit “D-7” minutes as quoted in the statement of the case [*supra*, pp. 16-17].

The wilful purpose of the defendant, in refusing to bargain, is shown by the Exhibit “D-8” minutes as quoted in the statement of the case [*supra*, p. 17].

These minutes show that the lawyers advised them that they were committing an unfair labor practice, as follows:

“Lawyers said we can’t refuse to bargain and told of consequences. Carpenters situation may or may not have been an unfair labor practice, * * *” [*supra*, p. 17].

These minutes further show that defendants proceeded with the unfair labor practices, in contempt for the laws of the country, upon the chance that the Labor Board might not assess any back pay, as follows:

“Benjamin expressed belief that even though N. L. R. B. might decide Producers had engaged in unfair labor practice there was a good chance the Board might not assess any back pay” [*supra*, p. 18].

National Labor Relations Board v. Crompton-Highland Mills, Inc., 93 L. Ed. Adv. 918 condemns the use of pretended impasses as the means of violating Section 7, at 919, as follows:

“In this case a collective bargaining representative was certified, under the National Labor Relations Act, to represent all employees working in a certain appropriate bargaining unit. Their employer engaged in extended negotiations with this representative as to many matters, including rates of pay. December 19, 1945, the negotiations reached an impasse. The question here presented is whether this employer engaged in an unfair labor practice when, on January 1, 1946, it put into effect as of December 31, 1945, without prior consultation with the bargaining representative, a general increase in the rates of pay applicable to most of the employees who had been represented in the negotiations. This increase was a substantially greater one than any which the employer had offered during the negotiations. For the reasons to be stated, we hold that, under the circumstances, this action constituted an unfair labor practice and that a decree should be entered enforcing an order prohibiting such conduct.”

3. THE USE OF THE MASS LOCKOUT OF ALL CARPENTERS, UPON SAID FALSE PRETENSE, AND THE REPLACEMENT OF ALL CARPENTERS WITH THE IATSE, BY THE CONSPIRING DEFENDANTS, WAS IN VIOLATION OF SECTION 7: (a) IN SAID REFUSAL TO BARGAIN WITH THE CARPENTERS, IN VIOLATION OF CONTRACTS; AND (b) IN SAID ATTEMPT TO SUBSTITUTE BARGAINING AGENTS, AND BAR PLAINTIFFS, AND THEIR CLASS FROM THEIR VOTING RIGHT TO CHOOSE AND MAINTAIN THEIR OWN BARGAINING AGENT.

NLRB v. Andrew Jergens Co., 175 F. 2d Adv. 130, at 133:

"* * * the company then refused to bargain with the Cosmetic Workers on the ground that they no longer represented a majority of the employees. * * * Thereafter, the Cosmetic Workers Union, apparently discredited in its attempt to achieve effective recognition, affiliated with the Teamsters on July 1, 1945.

"(1, 2) * * * respondent, in refusing to bargain with Teamsters with reference to union security, committed an unfair practice under Sec. 8(5) of the Act. * * * It held that the certification of the Cosmetic Workers' (recognition in this case) * * * stands until such certification has been rescinded by the National Labor Relations Board or the courts."

And at 134:

"(3) * * * the Board found respondent lacking in good faith in its negotiations with Teamsters and therefore guilty of an unfair practice under Sec. 8(5) of the National Labor Relations Act. This finding is supported by substantial evidence."

“(5) * * * Respondent cannot take advantage of the Board’s delay in order to relieve itself of making amends for its unfair practices.”

And at 135:

“(8) * * * In the Karp Metal case, 51 N. L. R. B. 621, the Board, in a similar situation, stated that it was its firm policy to assume that any losses of membership which are concurrent with or subsequent to unremedied unfair labor practices are results of such practices. * * * We are of the opinion that such policy is well within the scope of Sec. 10(c) of the Act, which permits the Board to take such affirmative action as will effectuate the policies of the Act.

“(9) While its employees were still on strike, respondent, without consulting the Teamsters, granted a general wage increase effective July 1, 1946. The Board found this action constituted an independent refusal to bargain within the meaning of Sec. 8(5) of the Act, and included appropriate remedial provisions in its ‘cease and desist’ order.”

4. **THE FACT THAT THE CONSPIRING DEFENDANTS WERE GUILTY OF SAID FLAGRANT UNFAIR LABOR PRACTICES DOES NOT DEPRIVE PLAINTIFFS, AND THEIR CLASS, OF THEIR CIVIL RIGHT OF ACTION FOR THE DAMAGE SUFFERED.**

Steele v. Louisville & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, upholds a civil right of action at page 207:

“The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunc-

tion in *Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks*, *supra* (281 U. S. 556, 557, 560, 74 L. Ed. 1039, 1041, 50 S. Ct. 427), and in *Virginian R. Co. v. System Federation R. E. D.*, *supra* (300 U. S. 548, 81 L. Ed. 799, 57 S. Ct. 592), and like it is one for which there is no available administrative remedy.

“We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty.”

POINT VI.

The United States District Court Has Jurisdiction of the Third Count, Embodying and Supplementing the Allegations of the First Count, Under Judicial Code Section 24(8), 28 U. S. Code 1337, Because Said Action Arises From the Violation and Continued Violation, of the Wagner, Taft-Hartley, Social Security and Civil Rights Acts.

The memorandum opinion of the District Court states a conclusion to the contrary [R. p. 136]:

“The deprivation of the right to bargain collectively is an unfair labor practice * * *. The exclusive power to prevent unfair labor practices is given to the Board * * *, and right of review lies not in this Court, but in the United States Court of Appeals * * *. This leads to the conclusion that the plaintiffs have in fact by said additional allegations, removed any doubt as to the lack of jurisdiction of this court as to the first asserted cause of action, unless plaintiffs right to sue in this court exists under

either Sections 301 or 303(b) of the Taft-Hartley Act.”

Section 1337:

“The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

Paragraph II to XXXVIII, and XXXIX and XL of the first count were adopted in the third count [R. pp. 30, 32].

It was alleged that the defendant companies are engaged in interstate commerce (Par. IX; *supra*, p. 4).

REFUSAL TO BARGAIN.

It was further alleged in the third count, among other things [R. pp. 31, 32], as follows:

“IV. That said right to collectively bargain, as provided in and granted by said act, created and vested in the plaintiffs, and said class of persons, a new and additional civil right not theretofore enjoyed or possessed by citizens of the United States in general, or by the plaintiffs, and said class of persons, in particular, and vested in them the civil right in the premises pursuant to Section 1980 of the Revised Statutes of the United States (Title 8, United States Code, Section 47), and guaranteed by Amendments V and XIV of the Constitution of the United States.”

“V. That, nevertheless, the defendants not respecting said civil rights of the plaintiffs, and said class of persons, have by their aforesaid acts and doings, nullified and rendered ineffectual their said right of collective bargaining, and have thus deprived

them of such right in the premises, and thereupon established, and have caused other parties to establish, a boycott, and have thereby deprived them of their right to be employed and work in said motion picture industry.”

“VIII. That although the plaintiffs, and said class of persons, have at all times herein mentioned been ready, able and willing to bargain with the defendants for the purpose of ending said boycott, and restoring their aforesaid civil rights, and have sought so to do, said defendants have refused to so bargain with them.”

1. PLAINTIFFS WERE ARBITRARILY DEPRIVED OF THEIR REMEDY BEFORE THE NLRB.

The allegations upon this point are set forth in Appendix “C” hereto attached.

In the Matter of Association of Motion Picture Producers, Inc. (*supra*, p. 42), the NLRB found certain of the defendants in this case guilty of unfair labor practices against the machinists, at page 467, as follows:

“1. We agree with, and adopt, the finding of the Trial Examiner that the Association is an employer within the meaning of the Act.”

“3. We agree with the Trial Examiner’s conclusion that certain of the Respondents discriminated against the employees listed in Appendix A of the Intermediate Report; and we adopt his finding that by such discrimination the Respondent producers Universal Pictures Company, Inc., Loew’s Incorporated, RKO Radio Pictures, Inc., and Warner Bros. Pictures, Inc., and the Respondent Association violated Section 8(3) of the Act. * * *”

The NLRB never had an opportunity to consider the charges of unfair labor practices, because the action of

the General Counsel, in supporting the IATSE member Trial Examiner, and in refusing to file complaints, was final.

Lincourt v. NLRB, 170 F. 2d 306, 307:

“As the Act now reads, the General Counsel of the Board ‘shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10.’ Such administrative determinations by the General Counsel are not denominated ‘orders’ in the Act, and the Act makes no provision for their review.”

The only recourse of plaintiffs, and their class, is to treat the negative action of the NLRB Enforcement Officers as void, and look to the courts for redress.

N. L. R. B. v. Phelps, 136 F. 2d 562, at 564:

“He caused the chief trial examiner to order the hearing reopened for the purpose of making Atlas Oil & Refining Corporation a respondent in the proceeding and to continue Denham as trial examiner. Though no charge has been made against Atlas and the filing of a charge must precede a complaint, Denham of his own motion issued an order to show cause why Atlas should not be made a party, and the complaint amended so as to charge it with offenses under the act. The proceedings having gone forward over the objections of the trustee and Atlas, and their motions to disqualify him, the examiner exhibited resentment and spleen toward them and gave expression to his pre-determined opinion of their guilt on the charges he was supposed to be trying.”

and at 566:

“Whatever ought to be said of the examiner’s persistent and partisan efforts to conduct the proceedings to a decision favorable to the Board, if the

examiner had been really in the position he assumed that he was in of an agent for the Board to sustain its charges, it cannot be successfully denied that his general attitude was not impartial but partial, not disinterested but partisan.”

and at 564:

“Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.”

2. **NOR CAN THE CONSPIRING DEFENDANTS TAKE ADVANTAGE OF THEIR OWN WRONGS IN CAUSING OFFICIALS OF THE CALIFORNIA UNEMPLOYMENT COMMISSION TO DENY MEMBERS OF PLAINTIFFS' CLASS FULL, FAIR, OPEN AND IMPARTIAL HEARINGS UPON THEIR RESPECTIVE CLAIMS FOR UNEMPLOYMENT AND DISABILITY BENEFITS.**

It has been shown, in the statement of the case [*supra*, p. 15] that the conspiring defendant motion picture companies, and Association, in pursuance of their conspiracy with the other defendants, after agreeing to lay off, lock-out and replace every carpenter with an IATSE, fraudulently agreed, a week in advance of the layoff, lockout and replacement, to falsely represent to the State Unemployment Authorities that each carpenter “employee left his work on account of a trade dispute,” and upon that agreement “to ask the Department to disqualify him for unemployment compensation.”

The action of the State Unemployment Authorities, caused by the conspiring defendants, in denying plaintiffs, and their class, full, fair, open and impartial hearings on

their respective claims for unemployment and disability benefits, and in denying said claims without lawful hearings thereon, was void.

Ohio Bell Telephone Company v. Public Utilities of Ohio, 301 U. S. 292 (67 S. C. 724, 81 L. Ed. 1093) at 304:

“Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. (Citing cases.) Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the ‘inexorable safeguard’ (Citing cases) of a fair and open hearing be maintained in its integrity (citing cases). The right to such a hearing is one of ‘the rudiments of fair play’ (citing cases) assured to every litigant by the Fourteenth Amendment as a minimal requirement (citing cases). There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.”

Nevertheless, the conspiring defendants, by causing this miscarriage of administrative law and procedure in the State Department of Employment, have placed the locked out carpenters under more onerous conditions of employment, and under an added burden in protecting and enforcing their rights against the conspiring defendants.

3. THE DISTRICT COURT HAS JURISDICTION UNDER SECTION 24(8) OF THE JUDICIAL CODE, 24 U. S. C. SEC. 41(8), 28 U. S. CODE 1337.

American Federation of Labor v. Watson, 327 U. S. 582 (66 S. C. 761, 90 L. Ed. 873), at 591:

“* * * We do not pass on the question whether the District Court had jurisdiction under Sec. 24(1) or Sec. 24(14) of the Judicial Code, for it is the view of a majority of the Court that jurisdiction is found in Sec. 24(8) of the Judicial Code, 28 U. S. C. A. Sec. 41(8), 7 F. C. A. title 28, Sec. (8) which grants the federal district courts jurisdiction of all ‘suits and proceedings arising under any law regulating commerce.’ As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit ‘arising under’ a federal law ‘regulating commerce.’”

POINT VII.

The United States District Court Also Has Jurisdiction of the Third Count Under Judicial Code Section 24(12) (14), 28 U. S. C. A. 41(12) (14), as Revised in 28 U. S. Code 1343, and Fifth and Fourteenth Amendments to the Constitution.

Judicial Code 24(12) (14), 28 U. S. C. A. 41(12) (14) have been revised and embodied in 28 U. S. Code 1343, giving jurisdiction under the Civil Rights Act, R. S. 1979 and 1980.

Plaintiffs' allegations relative thereto have been given in Appendix "C" attached hereto.

Bomar v. Keyes, 162 F. 2d 136, at 138:

"The plaintiff appeals from a judgment summarily dismissing her complaint in an action under the Civil Rights Act to recover damages for 'deprivation' of a privilege 'secured' by one of the 'laws' of the United States. * * *"

And at 139:

"(5) We start with the assumption that it was Keyes' complaint which caused the Board of Education to discharge the plaintiff, and that the ground of the discharge was her service upon a federal jury. If so, both Keyes and the Board united to cause pecuniary loss to the plaintiff by an act which the statute had made a legal wrong: Keyes, by instigating the Board, the Board by acting upon her instigation. * * * That wrong is independent of any breach of contract, and would be the same, if Keyes had induced the Board not to employ the plaintiff; indeed, we assume that her discharge by the Board was not a breach of contract at all. Nevertheless, it may have been the termination of an expectancy of continued employment, and that is an injury to an interest which

the law will protect against invasion by acts themselves unlawful, such as the denial of a federal privilege.”

Certiorari was denied November 17, 1947, 92 L. Ed. 400.

The jurisdiction under the Fifth and Fourteenth Amendments is submitted as apparent from the facts pled.

POINT VIII.

The United States District Court Has Jurisdiction of the Fourth Count Because the Agreement, Combination and Conspiracy of the Defendants Was in Restraint of Interstate Trade and Commerce, and Forbidden by the Sherman and Clayton Acts.

The memorandum opinion of the District Court states a conclusion to the contrary [R. p. 143], as follows:

“I likewise adhere to the conclusion announced at the same time that the fourth cause of action brought under the Antitrust Laws, 15 U. S. C. 15, does not state a claim for relief * * *.”

A copy of plaintiffs' fourth count [R. p. 33], and amendment thereto [R. p. 134], is hereto attached as Appendix “D.”

Reference is made to the statement of jurisdiction (*supra*, pp. 3, 6), the statement of the case (*supra*, pp. 7-18), the summary (*supra*, pp. 24-30), and the adoption of the allegations in paragraphs II to XL, inclusive, of the first count as a part of the fourth count. [R. pp. 33-35.]

It is submitted that said amendment, designated paragraph X, contains a comprehensive statement of a cause

of action under the Sherman and Clayton Acts [R. p. 134], as follows:

“X. That the conspiracies, and each of them, hereinbefore alleged in the paragraphs adopted from the First Cause of Action, and in this Cause of Action, have been in restraint of trade, and commerce, among the several states, and with foreign nations, within the meaning of the Sherman Act (15 U. S. C. A. 1); and that plaintiffs, and the members of the class for whom they sue, have been injured in their business and property by reason thereof, within the meaning of the Clayton Act (15 U. S. C. A. 15) to their damage as hereinbefore alleged.”

Jurisdiction is given by Section 4 of the Clayton Act (15 U. S. C. 15):

“15. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”

The agreements, combination and conspiracy entered into, carried out, and ever since continued, by defendants injured plaintiffs, and their class, in their business and property, and were forbidden by Section 1 of the Sherman Act (15 U. S. C. 1):

“1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage

in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

And by Section 2 thereof (15 U. S. C. 2):

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

1. PLAINTIFFS AND THEIR CLASS WERE PERSONS INJURED IN THEIR BUSINESS AND PROPERTY, IN THE CONTEMPLATION OF SAID SECTION 4 OF THE CLAYTON ACT (15 U. S. C. 15).

Reference is made to *Yazoo & M. V. R. Co. v. Webb* (*supra*, p. 32); *Nissen v. International Brotherhood of Teamsters, etc.*; *Schneider v. Duer, et al.*; *Carroll, et al. v. Local No. 269, etc.* (*supra*, p. 53); *Bautista v. Jones and Roseland v. Phister Mfg. Co.* (*supra*, p. 54), showing that the rights of plaintiffs, and said class, in and under said collectively bargained contracts, including their right to work as employees, and to their right to bargain for the extension or modification of said collectively bargained contracts, under the terms of said Exhibit "B-9" "Interim Agreement" (*supra*, p. 28), are business and property.


Reference is made to the statement of the case (*supra*, pp. 7-18), and summary (*supra*, pp. 24-30), showing that

plaintiffs, and said class, were injured in their said business and property.

Roseland v. Phister Mfg. Co. (*supra*, p. 54), is directly in point in the following statements at page 418:

“Defendants are the only persons manufacturing and selling such equipment in the United States. Their sales are extensive and profitable. On or about March 29, 1930 the three companies combined their activities for the purpose of suppressing competition in interstate commerce in such products, conspired to monopolize the commerce therein, securing and retaining a monopoly, * * *.”

just as the defendant companies, and Association, are a monopoly engaged in interstate commerce.

Loew's, Incorporated v. Basson (*supra*). 

And at page 419:

“Section 4 of the Act, Title 15, Sec. 15, U. S. C. A., provides that *any person* who shall be injured in his business or property, as a result of violation of the Act, may recover damages. Defendants moved to dismiss the complaint on the ground that it stated no cause of action for the reason that plaintiff, if he had any business, within the intent of the Act, was not within those to whom damages are granted. *The question, then, is whether plaintiff is such a person as may recover damages, whether he has a business which has been damaged.*” (Italics ours.)

“(1) *The language of the statute is general and all inclusive. It includes any person who shall be injured in his business or property.* We assume that the word business was used in its ordinary sense and with its usual connotations. It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or inter-

est. In a somewhat more truly economic, legal and industrial sense, *it includes that which occupies the time, attention and labor of men* for the purpose of livelihood or profit,—persistent human efforts which have for their end pecuniary award. *It denotes ‘the employment or occupation in which a person is engaged to procure a living.’* Allen v. Commonwealth, 188 Mass. 59, 74 N. E. 287, 288, 69 L. R. A. 599.” (Italics ours.)

all of which is applicable to plaintiffs and their class.

2. DEFENDANTS, INCLUDING THE IATSE DEFENDANTS, IN THEIR SAID AGREEMENT, COMBINATION, CONSPIRACY, AND ACTION IN SAID MASS LOCKOUT AND REPLACEMENT, AND INJURY TO PLAINTIFFS’ PROPERTY, ACTED, AND CONTINUE TO ACT, IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT (15 U. S. C. 1).

Reference is made to:

(1) The abortive conspiracy of April, 1945 (*supra*, p. 9); the fraud practiced by the IATSE in causing the ambiguous and void AFL award (*supra*, p. 10); the AFL Committee Exhibit “C-4” clarification correcting the ambiguity in the award, and conforming it to the intent of the Committee to follow contracts existing between the carpenters and the IATSE (*supra*, p. 10); the IATSE threat to “have all work stopped in the studios, exchanges and theatres” of the defendant companies if they respected the AFL award, as so clarified and intended (*supra*, p. 11);

(2) The agreement, combination and conspiracy that followed between the defendants: to pretend an impasse between the Companies and the carpenters (*supra*, p.

12); "to create an incident," as a trick and device against all carpenters, to lay off all carpenters in a mass lockout, and replace them with the IATSE, in violation of the existing collectively bargained agreements (*supra*, pp. 15-18, 24-30); to fraudulently block carpenters applications for unemployment and disability benefits during said lockout (*supra*, pp. 15, 67); to fraudulently block carpenters' charges of unfair labor practices (*supra*, pp. 59); and in connection therewith to refuse to bargain with the carpenters (*supra*, p. 8); *all of which was done, in pursuance of the conspiracy, for the purpose of depriving plaintiffs, and their class, of their property rights in and under their said collectively bargained contracts;* and

(3) The continuance of said mass lockout and replacement, interferences and refusal to bargain ever since, in deprivation of plaintiffs', and said class', said property rights in and under said collectively bargained contracts.

Allen Bradley Co. v. Local Union No. 3 (supra), at page 798:

"The question presented is whether it is a violation of the Sherman Antitrust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods."

and at 800:

"Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries."

just as these defendants coerced the Independents (supra, p. 16).

“* * * All of this took place, as the Circuit Court of Appeals declared, ‘through the stifling of competition,’ and because the three groups, in combination as ‘co-partners,’ achieved ‘a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.’ Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed.”

which was likewise a boycott of the employees of said outside manufacturers, just as plaintiff and their class have boycotted here.

“Quite obviously, this combination of business men has violated both Secs. (1) and (2) of the Sherman Act, unless its conduct is immunized by the participation of the union.”

and at 807:

“For the union’s contribution to the trade boycott was accomplished through threats that unless their employers bought their goods from local manufacturers the union laborers would terminate the ‘relation of employment’ with them and cease to perform ‘work or labor’ for them; and through their ‘recommending, advising, or persuading others by peaceful and lawful means’ not to ‘patronize’ sellers of the boycotted electrical equipment.” (Italics ours.)

just as the conspiracy with the employer defendants here was accomplished through the threats of the IATSE. (*supra*, p. 11.)

“* * * We pass to the question of whether unions can with impunity aid and abet business men who are violating the Act.”

and at 810:

“Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

“Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups.”

POINT IX.

This Is a Class Action Under Rule 23(a) in Which Plaintiffs Are Entitled to Sue for Themselves and Their Class.

1. The rights and wrongs pled are common to all members of the class, composed of the members of the United Brotherhood of Carpenters & Joiners of America, Local 946, employed, or eligible to be employed from their pool, by the defendant Motion Picture Companies, under the collectively bargained contracts, and all of whom were locked out of their employment, and right of employment, by the conspiring defendants.

2. The object of the action is the adjudication of claims which do or may affect specific property involved in the action, to-wit, the full amount to be determined by the accounting prayed, due plaintiffs and said class from the defendant Motion Picture Companies, and Association, jointly and severally, to compensate them for the wages they would have received in their employment under good faith observance of said collectively bargained contracts, both as to those who were employed in work tasks on September 23, 1946, the date of the mass lockout, and as to those who were in the pool subject and entitled to call as needed.

3. The questions of law or fact affecting the several rights and the relief sought are common to all members of the class.

4. The plaintiffs and their class also have a common interest, involved in the outcome of this action:

(a) In the maintenance of Local No. 946, as their bargaining agent, and as the local labor union of their choice; and

(b) In maintaining their freedom from the unlawful aggressions of the defendant IATSE, and the other conspiring defendants.

Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356 (41 S. C. 338, 65 L. Ed. 673), at 367:

"If the Federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree, when rendered, must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court."

Railway Express Agency v. Jones, 106 F. 2d 341, at 343:

"(1-3) While defendant's contention that a class suit may not be maintained where each claimant of the class asserts a separate claim based on individual and separate fraudulent representations, is sound, we are bound, at this stage of the proceedings, by the allegations of the complaint. It is possible, accepting the allegations of the complaint, that there exists a case of joint action upon identical fraud with the resulting total damage exceeding \$3,000. It is only after proof has been received on this issue, or admissions made in open court by plaintiff, that the court may, in view of the pleadings, deny plaintiff's right to sue for all; that is, to maintain a class suit."

Conclusion.

As shown by the *Yazoo* case (*supra*, pp. 32-33), appellants' collectively bargained contracts should have been "kept faithfully and without subterfuge."

As shown by the *Crompton-Highland* and *Jergens* cases (*supra*, p. 60), the contracts were violated, ruthlessly violated (*supra*, pp. 29-30).

In their violation the conspiring defendants caused miscarriages of administrative law and procedure in the two largest and most important social agencies of government (*supra*, pp. 65, 67).

By their continuing violation of said contracts and wrongs, defendants have all rendered themselves liable under Sections 301 and 303 of the Taft-Hartley Act (*supra*, pp. 36, 38, 39).

This case is of vast importance in the public interest.

By their conduct the conspiring defendants have raised grave constitutional questions.

Prayer.

Appellants respectfully pray that the Court:

1. Reverse the judgment of dismissal made by the District Court, upon each of the four counts;
2. Consider and determine the propriety of consolidating the first and third causes of action, so that the several grounds of jurisdiction therein presented may be stated in one count;
3. Consider and determine the propriety of consolidating this action and the actions in Appeals Nos. 12345 and 12346, to minimize the burden upon the courts; and
4. For such other action and guidance as the Court deems proper, to facilitate the trial and disposition of the cases.

Respectfully submitted,

ZACH LAMAR COBB,

Attorney for Appellants.



APPENDIX A.

MEMORANDUM OPINION.

The plaintiffs, individuals, are members of Carpenters Union Local 946, suing herein for damages. They sue as a class, as did some of the same individuals in case No. 6063 of this Court, decided by Judge Harrison on February 25th, 1947, *Schatte v. I. A. T. S. E.*, 70 Fed. Supp. 1008; affirmed *percuriam* without opinion January 16, 1948, 165 Fed. 2nd 216; *certiorari* denied 334 U. S. 812, May 3, 1948. The Union is not a party to either action.

The plaintiffs being members of the same class as in case No. 6063, are bound by the doctrine of *res judicata* under the decision in No. 6063-BH, as to all matters adjudicated therein which are likewise involved in this case. *Gregg v. Winchester*, 173 Fed. (2), 512. Even if that were not so, the reasoned force of Judge Harrison's opinion would compel concurrence therein.

In case 6063-BH, the thing involved was alleged to be the "right to work for wages"; here it is alleged to be not only that "right" but also, the "right to bargain collectively under Section 7 of the National Labor Relations Act as re-enacted in Section 7 of the Labor-Management Relations Act of 1947," as the complaint now reads after amendment by consent on the day of the argument. The value of such rights is asserted to be worth in excess of the jurisdictional amount of Three Thousand Dollars, as to each plaintiff.

Insofar as any claim for relief could be ferreted out of the 69 page printed complaint, under the Civil Rights Act, the National Labor Relations Act, and the 5th and 14th Amendments of the Constitution, which might arise from their "right to work," nothing more need be [118] said than to refer to Judge Harrison's opinion.

It is first necessary to determine whether or not the additional allegations above mentioned confer jurisdiction not existing under the "right to work" allegations disposed of by Judge Harrison's opinion. I cannot see that they do. The deprivation of the right to bargain collectively is an unfair labor practice (29 U. S. C. 158 (a) (1); Sec. 8 Wagner Act; *id.* Taft-Hartley Act). The exclusive power to prevent unfair labor practices is given to the Board (29 U. S. C. 160, (a)); Section 10 Wagner Act; *id.* Taft-Hartley Act), and right of review lies not in this Court, but in United States Court of Appeals, (*id.* subdivision (2)). See *Amalgamated Workers v. Edison*, 309 U. S. 261; *Amazon Mill Co. v. Textile Workers Union*, 167 Fed. (2), 183 C. C. A.; *United, etc. v. International, etc.*, 115 Fed. (2) 488. This leads to the conclusion that the plaintiffs have in fact by said additional allegations, removed any doubt as to the lack of jurisdiction of this court as to the first asserted cause of action, unless plaintiffs right to sue in this court exists under either Section 301 or 303 (b) of the Taft-Hartley Act.

Section 303 (b), in its first clause is a broad grant of jurisdiction to any District Court for determination of injuries to anyone . . . organization or individual, . . . regardless of amount, for injury to his or its business or property which may result from acts committed in violation of Section 303 (a). That grant of jurisdiction is however limited by the condition expressly contained in subdivision (b) that it is "subject to the limitations and provisions of Section 301 hereof."

Whatever else may be said (and a great deal [119] has been said in scores of pages of briefs and more than three full days of argument), any right of recovery under

Section 301 must rest upon a contract and its asserted violation. The whole Act relates to labor contracts, hence it must be a contract contemplated by the Act, i. e., a collective bargaining contract or contract relating to fair or unfair labor practices. If this were not otherwise clear it is made so by the language of Sec. 301, as it refers to "contracts between an employer and a labor organization representing employees * * * or between any such labor organizations." And the plaintiffs have set up or attempted to set up contracts between various labor organizations and employers. The question for decision then is whether or not jurisdiction of "suits for violation" of such contracts are limited to the employer and labor organizations, only, as parties, or may be brought in this court by individual members of a labor organization which is a party to a contract with an employer or with another labor organization.

The paucity of precedent permits recourse only to the language of the Statute and the legislative history, in the decision of that question. Without reciting the legislative history, I think it is plain from it that Congress did not intend to grant jurisdiction to the District Court, without regard to amount or diversity of citizenship, of every suit in which an individual member of any union might wish to assert a violation of a labor contract, whether the contract be between an employer and a labor organization, or between labor organizations. To have done so would be to have placed upon the District Court a staggering burden of litigation without the incidental provisions for [120] additional Judges, other personnel, and the court rooms to try them. The legislative history indicates to me beyond dispute that the intention of Congress by Section 301 was to provide a forum, other than the street, for

settlement of asserted violations of labor contracts by law suits, the parties to which could only be the parties to the contract involved, i. e., either the employer or the labor organization: And that it was intended that the labor organization alone could speak as a party to the suit on behalf of the employees it represented as a party to the contract. This conclusion is further borne out by the language of subdivision (c) of Sec. 301, which reads:

“(c) For the purpose of actions and proceedings by or against labor organizations in the District Court of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.” (Underscoring supplied.)

The provisions of subdivision (b) of 301 relating to suits by or against labor organizations and the effect of judgments in such suits, while couched in permissive language instead of mandatory, did no more than to eliminate the confusion which existed concerning the right of a union to sue and be sued, and the like, because of the various state laws under which a union might have been organized, and particularly to eliminate the fear that an individual member might be personally liable for the wrongs committed by his union in asserted violation of a contract. Without such permissive language, it could have been argued that 301 (a) did not give a labor organization a right to sue or be sued, except under the law of the State of its existence, or [121] where it was doing busi-

ness. And the same would be true as to the effect of judgments, service of process, venue, acts of agents, and things covered by the remainder of Section 303. *United, etc., vs. Wilson, etc.*, 80 Fed. Supp. 563, 568.

The plaintiffs contend that in any event they are appropriately parties plaintiff under Rule 23, Federal Rules of Civil Procedure, relating to class suits. Whether they do, or could, qualify under that rule is not necessary to determine as the provisions of Sec. 301 are inconsistent with Rule 23, Federal Rules of Civil Procedure, and must therefore prevail. Sec. 301 is a special and limited grant of jurisdiction which must be strictly construed. This is especially so in the light of the history of legislation dealing with labor relations and disputes such as the Clayton Act (15 U. S. C. 17), the Norris-La Guardia Act, (29 U. S. C. 101, et seq.,) the Wagner Act (29 U. S. C. 151), and the Act under consideration.

I conclude, therefore, that Section 301 does not give the plaintiffs as individual members of a union the right to sue in asserted violation of the contracts involved, whether their union was or was not a direct party to such contracts.

Coming now to the question as to whether or not Sec. 303 (b), without reference to Sec. 301, grants jurisdiction to the District Court of a right of action under Sec. 303 (a), if any exists, in the plaintiffs as against the defendant I. A. T. S. E., and the individuals who are labor organization officials. Without determining whether or not the plaintiffs could be proper party plaintiffs in any action against I. A. T. S. E. in this [122] or any other court, i. e. if they could state a cause of action for violation of Sec. 303 (a), it seems clear to me that this court was not granted jurisdiction. It is noted in Section 301 (a)

that the grant of jurisdiction therein contained was "without respect to the amount in controversy, or without regard to the citizenship of the parties." And that the grant of jurisdiction in 303 (b) is only "without respect to the amount in controversy" and that nothing is said with regard to the citizenship of the parties. In an act as controversial as the Taft-Hartley Act, it can hardly be supposed that such an omission of a jurisdictional grant was an oversight, and that rules of statutory construction can be strained to the point of reading it into Sec. 303 (b). This is particularly so in light of the history of so-called "labor" legislation, to which allusion was previously made.

Furthermore, it is logical that Congress in giving limited jurisdiction to the District Courts in suits between the unions themselves and employers by Sec. 301, should have let the bars of jurisdiction down as to both amount and diversity of citizenship because the number of suits that can get into the District Courts thereunder is limited to the formal parties to contracts. But the right of action granted in Sec. 303 (b) is much broader than the right of action under 301. Under Section 303 "Whoever shall be injured in his business or property may sue, if such injury is the result of any act committed in violation of Sec. 303 (a) without regard to the existence or non-existence of any contract. Conceivably any person, whether a party to a labor contract or not, might be [123] injured by the acts proscribed in Sec. 303 (a).

The parties to suits under 301 are limited to actual parties to contracts, but the persons who might be injured by the practices proscribed by 306 (b) would not be so limited. It is thus logical that Congress should have re-

quired the diversity of citizenship set forth in Section 1332 of Title 28, U. S. C. as an additional jurisdictional prerequisite for actions under Sec. 303 (b).

The “limitations and provisions” of Sec. 301 which are adopted by reference in Sec. 303 (b) have reference to the “limitations and provisions” which are not in conflict with the specific language of Sec. 303. Thus the provisions of subdivision (b), (c), (d) and (e) of Sec. 301 relating to acts of agents of unions, suits of a union as an entity, non-enforcibility of judgments against the property of individual members, jurisdiction in districts where the union has its principal office or where its agents are engaged in the business of the union, and service of legal process, would appear to apply to suits brought under Secs. 303 (b). But the lack of diversity under Section 303 (b) cannot be supplied by such reference to “limitations and provisions” of Sec. 301, in view of the omission of any such provision concerning diversity in Sec. 303 (b).

No such diversity being alleged as to said defendants, this court does not have jurisdiction of any cause of action which the plaintiffs have attempted to assert against the defendant I. A. T. S. E. and said individuals.

The defendant employers take the position that Sec. 303 (b) does not confer any jurisdiction on this [124] court for the reason that Sec. 303 confers jurisdiction only for actions against “labor organizations.” It is not necessary to decide that question here. It would seem to me to be improper to do so, for the reason that employers and labor organizations might conceivably be liable for concert of action between them, and that question should be decided by a court which would have jurisdiction to try and decide such a case.

This court lacks jurisdiction of the defendant employers for another reason. Under Section 1332 of the new Title 28 U. S. C. the court has jurisdiction only of actions between citizens of different states or of foreign states. I do not think the language of Sec. 1332 of Title 28 needs any clarification. But if there is any doubt that it means that the diversity must exist as to all parties, either plaintiff or defendant, then that doubt is eliminated by reference to the removal statutes. It is illogical that this court has no greater jurisdiction of a case originally filed in this court, than a case which is attempted to be removed to this court. The language of the previous judicial code limiting removal to controversies which are "wholly between citizens of different states" (Sec. 71 of former Title 28 U. S. C.) has been changed and made even stronger by the provisions of Sec. 1441 (b) of the new Title 28 U. S. C. which provides that an action, "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought" (underscoring supplied). It does not appear from the complaint that none of the parties defendant is a citizen of California. Hence there is no jurisdiction [125] in this court under Sec. 303 of any cause of action attempted to be stated against the defendant employers.

What has heretofore been said applies with equal force to the so-called second cause of action.

I indicated from the bench during argument (Tr. 251) that the third cause of action should be dismissed for the

reason that the facts attempted to be set out in it did not show any asserted denial of civil rights by any State Government, or under any color of the law of any State, and that no claim for relief was stated under the Social Security Act, or the California unemployment Act. (See cases cited in Judge Harrison's Opinion, *supra*, on that point). I adhere to that conclusion, but add that this court lacks jurisdiction of the third cause of action for lack of diversity.

I likewise adhere to the conclusion announced at the same time that the fourth cause of action brought under the Antitrust Laws, 15 U. S. C. 15, does not state a claim for relief for the reason that the allegations of possible injury to the plaintiffs, to the effect that the acts of defendant will increase the cost of making motion pictures, which increase will in turn cause an increase in the price of admission to motion-picture theaters to be paid by the plaintiffs, if, as, and when they may want to attend a theater, are so nebulous, remote, speculative and conjectural as to form no basis for a claim for relief.

The motions to dismiss are granted. In view of the fact that the complaint has now been amended three times, and that the decision in case No. 6063-BH, *supra* is now final, the dismissal will be without leave to amend.

Los Angeles, California, May 27th, 1949.

[Endorsed]: Filed May 27, 1949. Edmund L. Smith, Clerk. [126]

APPENDIX B.

JUDGMENT OF DISMISSAL.

The motions of certain defendants to dismiss the Second Amended and Supplemental Complaint, as amended by an amendment to Second Amended and Supplemental Complaint dated December 3, 1948, and each and every claim for relief stated therein, upon the grounds that the Court lacks jurisdiction over the subject matter of said complaint and each cause of action thereof and that said complaint and each cause of action thereof fails to state a claim upon which relief can be granted, having heretofore been submitted to this Court for determination and this Court having granted said motions without leave to amend.

Now, Therefore, It Is Ordered, Adjudged and Decreed that [127] the above-entitled action be and the same is hereby dismissed without leave to amend.

Dated: July 1st, 1949.

PEIRSON M. HALL

Judge

Approved as to form, as provided in Rule 7(a) of the Rules of the United States District Court for the Southern District of California. Bodkin, Breslin & Luddy, by Michael G. Luddy, Attorneys for Certain Defendants. O'Melveny & Myers, by Homer I. Mitchell, Attorneys for Certain Defendants.

Plaintiffs object to the foregoing form of order, and to the contents thereof, in so far as they go beyond the Court's memorandum opinion dismissing the action for want of jurisdiction.

Dated: July 1, 1949.

ZACH LAMAR COBB

Attorney for Plaintiffs

Judgment entered Jul. 1, 1949. Docketed Jul. 1, 1949. Book, 59, page 300. Edmund L. Smith, Clerk, by C. A. Simmons, Deputy.

[Endorsed]: Filed Jul. 1, 1949. Edmund L. Smith, Clerk; by C. A. Simmons, Deputy Clerk. [128]

APPENDIX C.

ALLEGATIONS RE EXHAUSTION NLRB REMEDY.

[R. pp. 31-32.]

“VI. That by the same means defendants have induced certain public officials of the United States, viz., in the NLRB, to deny plaintiffs, and said class of persons, their right to a fair and impartial hearing on charges of unfair labor practices on the part of defendants, heretofore made against defendants by certain members of said class, and to deny action thereon, in violation of the National Labor Relations Act, as amended, and of the Labor-Management Relations Act, 1947, and of said Civil Rights Act, Section 1979 (8 U. S. Code 43).” [R. p. 31.]

“VII. That by the same means defendants induced certain public officials of the State of California, viz., in the California Employment Commission, to deny certain of plaintiffs, and of said class of persons, a full, fair, open and impartial hearing upon their respective claims for unemployment and disability benefits to which they are entitled, and of which they are being deprived, in violation of the Social Security Act, Section 303 (42 U. S. Code, 503), and of the California Unemployment Insurance Act, as amended, Section 70, and of the Regulations thereunder, Article 31, Sections 310 and 315, and in violation of the said Civil Rights Act, Section 1980, of the Revised Statutes of the United States (Title 8, U. S. Code, Section 47).” [R. p. 32.]

It was intended that paragraphs VII to IX, inclusive, of the second count [R. pp. 27-30] be adopted and embodied in this third count, as follows:

“VII. That to such end, on October 23, 1947, individual members of said class, who were respectively employees of said employer defendants filed charges

of unfair labor practices, against said employer defendants, and also against said defendant IATSE, with the National Labor Relations Board, hereinafter called NLRB, and said charges were referred to a Field Examiner in the Los Angeles, California, regional office of said NLRB for investigation and report. That in the course of his investigation, said Field Examiner called upon said complaining members of said class to appear before him, and to cause others to appear, and make sworn statements of said charges. That said complaining carpenters thereupon, by counsel, requested said Field Examiner, and said Los Angeles Regional Office of the NLRB, to permit their counsel to be present at said examination, to protect their rights, and at the same time to aid the Examiner in obtaining full statements of fact. That this request was denied by the Field Examiner, by the Regional Director of the Los Angeles Office, and by the General Counsel, of the NLRB.

“VIII. That on or about May 10, 1948, subsequent to the hearings conducted by said Field Examiner, on the charges of each of the complaining members of said class, and before his investigation had been completed, and his report made, knowledge came to said complaining parties that said Field Examiner at the time of said hearings, and immediately, and for a long time prior thereto, had been continuously a member of said defendant labor union IATSE. That said complaining members of said class thereupon immediately, on May 10, 1948, gave said Field Examiner notice, in writing, that they had heard he was a member of the IATSE, and called upon him for the facts. That thereafter, on May 13, 1948, the Regional Director of the Los Angeles Regional Office of the NLRB advised said complaining members of said class, that it was a fact that said Field Examiner was, and had been a member of the IATSE, as aforesaid, and that

the officers of the NLRB had for a long time had knowledge thereof.

“IX. That thereupon said complaining members of the class, by their counsel, on May 14, 1948, notified the Chairman of the NLRB, in writing, of said disqualification of the Field [25] Examiner, and of the NLRB officials responsible for assigning said charges to him for investigation and report, and that by reason of the foregoing the complaining members of said class had not, and could not, have a fair and impartial hearing of their aforesaid charges, and further requested the removal from such investigation of said Field Examiner, and those of his superiors who, with the aforesaid knowledge of his said disqualification, had nevertheless assigned said hearing to him. That nevertheless said NLRB, and its General Counsel, refused to remove said Field Examiner, or his said superior, or any of them, and permitted said Field Examiner to complete his investigation, make his report, and thereupon act thereon, in dismissing the charges against said IATSE, and in refusing to proceed upon the charges against said employer defendants, to the detriment and damage of said complaining members of said class.

“X. That by the aforesaid unlawful acts and doings said defendants have caused the plaintiffs, and said class of persons, to be deprived of their lawful work tasks from said day, and down to the present time, and as a direct consequence thereof have caused the plaintiffs, and said class of persons, to generally lose and be deprived of large sums of money they would have otherwise earned in their work tasks as aforesaid, and have caused them to lose and be deprived of their respective unemployment benefits under the laws of the United States and of the State of California.”

APPENDIX "D."

FOURTH COUNT OF COMPLAINT.

"I.

That the jurisdiction in this action arises under Title 28, U. S. C. A., Section 1343, and under the Sherman and Clayton Acts (15 U. S. C. A., Section 15).

II.

That plaintiffs here adopt paragraphs II to XXXVIII, inclusive, of the first cause of action, the same as though pled herein in full.

III.

That the defendants have, by their aforesaid unlawful acts and doings, established and since continuously boycotted, and have caused other producers, called independent producers, of motion pictures, whose productions are also sold, transported, released and exhibited in interstate commerce, to also boycott certain plaintiffs, and members of said class of persons theretofore employed, or eligible to be employed, by such independent motion picture producers, and employ in their place and stead members or permittees of said IATSE.

IV.

That a large part of the members or permittees of said IATSE, which said independent motion picture producers were so compelled to employ, were and are less competent [28] workmen than the plaintiffs, and said class of persons, so that said independent motion picture producers were required to and did employ a great many more persons in the performance of carpenter work in their respective studios than they otherwise would have been re-

quired to do, and have unlawfully caused the members of said IATSE accordingly to profit thereby.

V.

That plaintiffs are informed and believe, and therefore allege that by such means, and as a direct consequence thereof, said employer defendants, in cooperation with the defendant IATSE, have, as they intended, materially increased said independent picture producers' cost of production, and reduced their profits accordingly.

VI.

That said employer defendants are well able to absorb and bear such increases in cost of production and consequent loss of profits, but as plaintiffs are informed and believe, and therefore allege, many of said independent producers are not.

VII.

That plaintiffs are informed, believe, and therefore allege, that when said employer defendants have, or shall hereafter have, eliminated the competition of said independent motion picture producers, or a substantial number thereof, they intend to and will pass on the amounts of their said increased costs and attendant loss of profits by increasing the price of their products in amounts agreed upon, which must ultimately be borne by the several theater owners who shall exhibit the same, and the public, including plaintiffs, and said class, who patronize said theaters.

VIII.

That said unlawful acts and doings of the defendants have, and will, result in an unlawful restraint of trade and monopoly in violation of said Sherman Act.

IX.

That plaintiffs here adopt paragraphs XXXIX and XL of the first cause of action, the same as though pled herein in full.

AMENDMENT TO FOURTH COUNT.

X.

That the conspiracies, and each of them, hereinbefore alleged in the paragraphs adopted from the First Cause of Action, and in this Cause of Action, have been in restraint of trade, and commerce, among the several states, and with foreign nations, within the meaning of the Sherman Act (15 U. S. C. A. 1); and that plaintiffs, and the members of the class for whom they sue, have been injured in their business and property by reason thereof, within the meaning of the Clayton Act (15 U. S. C. A. 15) to their damage as hereinbefore alleged [115].

No. 12,323.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G. CLEMENS
and H. G. McBRIDE, doing business as IDEAL MANU-
FACTURING COMPANY,

Appellees.

APPELLANT'S OPENING BRIEF ON REHEARING OF APPEAL.

ALAN FRANKLIN,

356 South Spring Street,
Los Angeles 13, California,

Attorney for Appellant.

J. CALVIN BROWN,

704 South Spring Street,
Los Angeles 14, California,

Of Counsel.

JAN 28 1952

PAUL P. O'BRIEN
CLERK



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FACTURING COMPANY,

Appellees.

APPELLANT'S OPENING BRIEF ON REHEARING OF APPEAL.

Chronology of Appeal.

This is a rehearing by this Honorable Court in accordance with its Order, dated September 14, 1951, granting appellant's Motion for Reconsideration of His Petition for Rehearing, which was denied by this Court on December 15, 1950, and thereby left standing this Court's affirmance of the Judgment of the District Court for the Southern District of California, Northern Division, in the Ninth Circuit, entered March 28, 1949.

Statement of the Case.

This case, as originally filed and tried by the District Court, was a Federal suit in equity for infringement of two United States Letters Patent, to wit: (1) United States Letters Patent No. 2,288,159, issued in the name of Fredrick J. Ernst to plaintiff-appellant, Earl Ernst, Administrator of said Fredrick J. Ernst, on June 30, 1942, for an invention in a Sacking Device, Plaintiff's Exhibit No. 1 [Tr. p. 46], and (2) United States Letters Patent No. Re. 22,740, issued to the plaintiff-appellant herein, Earl A. Ernst, on April 2, 1946, for an invention in a Sack Jigger, Plaintiff's Exhibit No. 2 [Tr. p. 46]. Said last named Letters Patent No. Re. 22,740, Plaintiff's Exhibit No. 2, is a reissue of plaintiff-appellant's United States Letters Patent No. 2,347,474, issued April 25, 1944, for an invention in a Sack Jigger, Plaintiff's Exhibit No. 2-A [Tr. p. 47].

After the decision of this case on appeal, by this Honorable Court, appellant, upon filing his first Petition for Rehearing, withdrew and excluded his Letters Patent No. 2,288,159 from his said petition and from this appeal, without waiving any of his rights under said patent, which he may still have, in order to shorten and simplify this appeal; and this rehearing is thereby limited to the question of infringement of appellant's United States Letters Patent No. Re. 22,740, by the accused Sack Jiggers of the defendants-appellees.

Appellant's invention, as covered by this United States Letters Patent in suit, No. Re. 22,740, is a practical and very successful machine which has been, and is now being, used successfully and extensively in the United States and in Canada [Tr. pp. 53-55] for receiving potatoes in sacks

mounted on a platform or jigger board 22, and for “jiggling” said sacks containing potatoes and thereby settling and packing down the potatoes in said sacks and thus sacking the potatoes for sale in the market.

Prior to appellant’s Sack Jigger machine, Patent No. Re. 22,740, potatoes and the like were *sacked by hand* [Tr. pp. 52-53], since none of said earlier sacking machines had a “*jigger board*” or any other *automatic means* for “jiggling,” settling and packing potatoes in sacks for the market. Consequently the earlier hand operated potato-sacking machines, *as exemplified in Plaintiff’s Exhibit No. 7*, were too slow [Tr. p. 90], and inefficient to meet the demand of the market [Tr. pp. 52-55].

Appellant’s Invention.

Appellant’s invention in suit, as embodied in Claim 1 of his Letters Patent, No. Re. 22,740, Plaintiff’s Exhibit No. 2, comprises a new machine, which includes a novel *jigger board* or *platform* indicated (22) in the specification and drawing in said letters patent in suit, and vibratory operating mechanism (58) mounted in a central frame unit or central locus of the machine, indicated (1), for reciprocating, or moving said jigger board horizontally lengthwise forwardly and backwardly for jiggling potatoes or the like in the sacks indicated (34) supported on said jigger board (22), which is operatively suspended from the frame (1 to 11, inclusive) of the machine at its ends, and at two points intermediate its ends, by hanger means, such as straps or links (23), which links are pivotally connected at their upper ends to a frame extension (24) and at their lower ends to said jigger board (22), as clearly shown in Fig. 1 of the

drawing of said patent in suit, No. Re. 22,740. The jigger board (22), as shown in said patent, is suspended by said links (23) at the front side edge of an endless horizontal conveyor belt 46, *parallel to and below said edge of said belt*, which belt travels over a pair of rollers 47 and 48, which rollers 48 are mounted in a bearings 50 (Fig. 3) in the central frame unit (1) of the machine, and which rollers 47 are mounted in bearings 49 on the end posts of an elongated side portion or extension 2 or 3 of the machine. It should here be noted that appellants, Sack Jigger, as illustrated in Figs. 1 and 2 of the patent in suit on appeal, No. Re. 22,740, may be divided into three parts, to wit: "a central portion 1 and elongated side portions or extensions 2 and 3. These side portions may be identical in construction and are identical in this form of the invention, but need not necessarily be identical. *One of the side portions (2 or 3) may be omitted entirely.*" (See first page, left column, lines 49 to 54, of the specification of said patent in suit.)

Since it is unnecessary to describe more than one of the two identical portions or extensions 2 and 3 of the invention in suit, *the portion or extensions 3 only, at the right side of the central portion or unit 1* will be described, omitting description of the identical left side portion 2 of the machine. The jigger board (22) is constructed with a series of cleats (28), secured to the upper side of said jigger board, across the same, in spaced relation to each other opposite the elongated side portion 3 of the machine, which spaced cleats (28) present a plurality of areas or stations on the jigger board (22) upon which cleats the bottoms of the sacks (34), respectively, are placed to be filled with potatoes or the like and the same compacted in said sacks as the jigger board (22) is reciprocated, as

hereinafter more fully described. Said cleats (28) also strengthen the jigger board and reduce the likelihood of its warping. The upper open ends of the sacks (34) are hung in U-shaped frame units 37 (Figs. 1, 2, 3, 5, 6, and 7) on hooks 36 of said frame units (Figs. 6 and 7) of the patent in suit No. Re. 22,740, which frame units 37 project forwardly from a *stationary* plank 12 of the upper front wall of the said portion 3 of the machine directly over the jigger board (22) (Figs. 1, 2, 3 and 5). The frame units 37 and the hooks 36 (Figs. 6 and 7) carried thereby are located slightly below the level of the upper reach of the conveyor belt 46 of the portion 3 at the right of the machine, and forwardly of the outer or front side edge of said belt, as clearly shown in Figs. 1, 2, 3, 5 and 7 of the drawings of the patent in suit, so that the potatoes on said upper reach of said conveyor belt 46 may be diverted forwardly therefrom by adjustable baffle plates or shearers 72, successively, over said outer or front side edge of said belt into said upper open ends of the sacks (34), successively, which sacks are supported on the jigger board (22) and held open at their upper ends by the sack frame units 37, respectively.

The jigger unit, or *vibratory mechanism or means* (58), referred to and included as an element in Claim 1 of the patent in suit, Re. No. 22,740, is mounted in the central frame unit or central open locus (1) of the machine covered by said patent, for moving the jigger board (22) lengthwise forwardly and backwardly horizontally, for jiggling said jigger board to settle and compact the potatoes in the sacks (34) on said jigger board, which jigger unit or vibratory means (58) is driven by an electric motor 67 mounted on the left side of said central frame unit (1) as shown in Figs. 1 and 3 of the draw-

ings of the patent in suit. A crank 56 (Fig. 2) is secured on the forward end of a shaft 53 driven by said motor 67, through pulleys and belts, which crank 56 is journaled in a plate 57 (Figs. 1 and 2) of a push and pull rod unit or "jigger" (58) (Figs. 1 and 2), which jigger unit includes a bar 59 (Fig. 1) secured at one end to said plate 57, and pivotally connected at its outer end at 61, to the upper end of the vertical arm 62 of an angle bracket 60, the horizontal arm 63 of which bracket is bolted to the jigger board (22). The plate 57 and the bar (59) connected to said plate and to said bracket 60 constitute the "*pitman*" referred to in claim 1 of the patent No. Re. 22,740 on which claim this suit is brought.

In operation, the unfilled sacks (34) are first placed upon the platform or jigger board (22), with the bottom of each sack resting upon said jigger board over a station cleat (28) and with the upper open end of each sack hung at its four corners on the four hooks 36 of a U-shaped frame unit 37. The cleats (28) provide separate stations for the potato sacks (34) in suitably spaced relation longitudinally along the platform or jigger board (22) and hold the bottoms of said sacks against slipping lengthwise on said jigger board, while the frame units 37 hold the upper ends of the sacks 34 in open position to receive the potatoes from the conveyor belt 46, through said upper open ends into said sacks. The motor 67, being turned on, the platform or jigger board (22) is reciprocated or moved forwardly and backwardly lengthwise thereof, by said motor 67, through the medium of the vibratory means (58) including the pitman 59 and bracket 60 connecting the left or remote end of said pitman 59 to the jigger board 22, while the conveyor belt 46 of the right side portion 3 of

the machine is shown driven, with its upper horizontal reach moving outwardly to the right over its rollers 48 and 47, by said motor 67, through the medium of part of the vibratory means (58) and a sprocket 55 of said vibratory means, through an endless chain 71 extending over said sprocket 55, sprockets 51 and an idler 52. Potatoes are then delivered from a grader [such as shown in Plaintiff's Interrogatory, Exs. 3-3] or otherwise onto the inner end of the upper reach of said endless conveyor belt 46, and said potatoes are conveyed outwardly by said belt on its upper reach, until said potatoes strike against the baffle plates or shearers 72 extending forwardly at an angle across the upper surface of said belt 46 of the side portion 3 of the machine, and said potatoes upon striking said baffle plates or shearers 72 are deflected laterally and forwardly thereby from said belt 46 over the front side edge of said belt, at the front of the machine, and the potatoes are thereby dropped from said front edge of said belt through the upper open ends of said sacks (34) into said sacks, respectively, supported on the right end portion of the platform or jigger board (22), at the front of said side portion 3 of the machine, and the potatoes, thus dropped into said sacks are "jiggled" and thereby settled and packed compactly in said sacks by the horizontal forward and backward movement of the platform or jigger board (22), which movement of the jigger board is produced by the motor 67 and interconnected mechanism, as aforesaid.

In the operation of the machine, the baffle plates or shearers 72 may be moved manually inwardly or out-

wardly on the rods 75 and 76 from one sack (34) to another as each sack is filled with potatoes, deflected from the belt 46 by the baffle plates or shearers 72, as above described.

When a sack (34) is filled with potatoes deflected by a baffle plate or shearers 72 from the belt 46, and said potatoes are settled and compacted in said sack by the vibratory means (58) and the platform or jigger board (22), the baffle plate or shearer 72 is then shifted along the belt 46 to an empty sack for filling and packing said sack as above described. The filled and packed sack is then disconnected at its upper end from its upper connecting frame unit 37 and said sack is then finally removed from the jigger board (22) and another empty sack is then substituted for said removed sack, and the above-described operations may be then repeated indefinitely.

Important Issue of This Rehearing Is Question of Infringement of Claim 1 of Appellant's Reissue Patent No. 22,740, Which Patent Was Declared Valid by Lower Court.

This rehearing has been materially shortened by excluding therefrom appellant's patent in suit before the lower court, No. 2,288,159, June 30, 1942, for Sacking Device, and by restricting this rehearing to the sole issue of *infringement of Claim 1* of appellant's Reissue Patent, No. Re. 22,740, April 2, 1946, for Sack Jigger, by the appellee's accused sack jigger machines, the lower court having declared appellant's said Reissue Patent No. Re. 22,740 valid [Tr. 17, 31 and 32].

Infringement of Appellant's Reissue Patent No. 22,740 Was Tried Primarily on Plaintiff's Interrogatories and Was Proved by Defendants' Answers to Said Interrogatories Admitting All Elements of Claim 1 of Said Patent, Which Elements Are Duplicated in Defendants' Accused Machine, Plaintiff's Exhibit No. 3-3.

Plaintiff's-Appellant's suit for infringement of his Reissue Patent No. Re. 22,740, for Sack Jigger, by the defendants-appellees, was based and tried upon Plaintiff's Interrogatories, Plaintiff's Exhibit 5, and infringement of Claim 1 of Plaintiff's said Reissue Patent, by the defendants, was fully proved at the trial by the Defendants' Answers to Plaintiff's Interrogatories IV, VI and XI, Plaintiff's Exhibit 6, which interrogatories were directed to the defendants'-appellees' Sack Jiggers, illustrated in the two photographs, Plaintiff's Interrogatory Exhibits 3-3. Defendants'-Appellees' Answers to Plaintiff's Interrogatories IV, VI and XI definitely admit that the defendants-appellees have made and sold Sack Jigger apparatus, as illustrated in said two photographs, Plaintiff Interrogatory Exhibits 3-3 prior to the filing of Plaintiff's-Appellant's action for infringement of his patent in suit Reissue No. Re. 22,740.

Claim 1 in Suit of Appellant's Patent Re. No. 22-740.

Claim 1 of Plaintiff's-Appellant's Patent, Reissue No. 22,740, on which claim this suit is brought, is reproduced here below with the reference numerals of the patent specification designating the elements of the invention in suit, appearing after said elements, respectively, in said claim, as follows:

“1. In a device for shaking containers and the like (34) to settle the contents thereof, a framework (1

to 11, inclusive), a platform (22) for supporting a plurality of containers (34), hinged means (23) supporting the platform from the framework, vibratory means (58) connected to the platform for shaking it and the containers supported thereby, said means including a pitman (59) adjacent the platform, coupling means (60) connecting the pitman with a portion of the platform, and rotary means (56) attached to the pitman for reciprocating it, said platform including an elongated surface (22') with container stations (28) from the ends thereof to a central open locus (1), said vibratory means (58) having its connection (60) with the platform at this central locus (1)."

In the claim, as above stated, certain elements are referred to in different, but equivalent terms of the patent specification. For example "containers" (34) of the claim are referred to as "sacks" 34 in the patent specification. "Vibratory means" (58) of the claim is referred to as a "jigger" in the specification. The numeral (22') does not appear in the specification and is supplied in the claim to distinguish the "elongated surface" of the platform (22) or "jigger board" as said platform is often called.

The reference numbers of the specification of the patent in suit, as applied to Claim 1 of said patent, as above set forth, are also shown applied to the parts or elements of Plaintiff's Exhibits 8, 3-3, 11c, 13 and 12A and models which formed a part of Appellants' Motion for Reconsideration of Petition for Rehearing, and are part of the record of the case.

Comparison of Elements of Patent Claim Sued on,
and Defendants' Accused Machines, Particularly
Plaintiff's Exhibit 3-3.

Every element of Plaintiff's-Appellant's above-stated Claim 1 of his patent in suit, Reissue No. 22,740, *is found* in Defendant's-Appellee's accused machines, and particularly in the two photographs of the defendant's-appellant's accused machine *Plaintiff's Interrogatory Exhibit 3-3*, and in plaintiff's working model of said accused machine, identified by the same exhibit number.

In a crude attempt to avoid infringement of Claim 1 of Appellant's Patent, Reissue No. 22,740, defendants-appellees resort to the completely discredited expedient of merely making an *integral* element in *two* parts in an accused machine, instead of in *one unitary* element, as illustrated in a patent sued on, *without changing the function, operation or result* of such patent including the *integral element* with only a *single part*.

"And infringement is not averted * * * by the separation of *one* integral part into *two*, the parts doing substantially what was done by the *single part*."

Walker on Patents, Vol. III (Deller's Ed), pp. 1698-1699, Sec. 462.

In the case at bar the feeble expedient resorted to by the defendants-appellees, to avoid infringement of Claim 1 of the patent in suit, amounts to nothing more than cutting the plaintiff's-appellant's *one* single and continuous platform or jigger board (22) into *two* platforms or

jigger boards (22) and connecting the inner ends of said *two* cut platforms or jigger boards (22) to the outer ends of two pitmen (59), respectively, at a central locus 1, the inner ends of both of said pitmen being connected to a jigger or vibratory means (58) which vibratory means, through said pitmen, vibrate said two cut jigger boards (22) for jiggling the potatoes. Such a slight and immaterial variation in the defendants'-appellees' accused machine, Plaintiff's Interrogatory Exhibits 3-3, does not change the function, operation and result of the defendants'-appellants' machine, Plaintiff's-Appellant's Interrogatory Exhibits 3-3, one iota, from the function and operation performed and the result accomplished by the plaintiff's-appellant's Sack Jigger machines as shown in Plaintiff's Exhibits 2 and 8.

Infringement of Claim 1 of the patent in suit, by the defendants-appellees, Plaintiff's Interrogatory Exhibit 3-3, not being averted by the defendants-appellees, in making their jigger board (22) in *two* parts, instead of *one* and their connection of said parts by *two* pitmen (59), respectively, to a vibratory means (58) instead of by *one* pitman (59), as covered by said patent Claim 1 in suit, complete infringement of said claim is otherwise established by the obvious *identity* of the *remaining elements* of the Defendants'-Appellees' Sack Jigger, Plaintiff's Interrogatory Exhibit 3-3, and model thereof, to the elements 34, 1 to 11, 22, 23, 58, 59, 60, 56, 22', 28 and 1 of Claim 1 of the patent in suit, Reissue No. 22,740.

Law Well Settled in This Circuit That Slight Changes of Form, Such as Making an Element in Two Parts, Instead of One, or Vice Versa, Does Not Avoid Infringement of Patent.

"In a suit for infringement of a fan, it is no departure from the patent to use a *blank of blades* instead of *single blades*, or a *two-piece* hub instead of a *one-piece* hub to accomplish the same result."

Samsom-United States Corp. v. Sears-Roebuck & Co., 103 F. 2d 312, (C. C. A. 2d, 1939), cert. den. 307 U. S. 638, 83 L. Ed. 1519 (1939).

"In infringement suit, separation in accused device of *one* unit into *two* parts, performing the same function in the same manner as a unit of the infringed structure, does not avoid infringement." (both U. S. C. A. and Sup. Ct. held Exhibits 5 and 7 infringements because of separation of *one* unit into two parts.)

Ace Patents Corp. v. Exhibit Supply Co., 119 F. 2d 349 (C. C. A. 7, 1941), mod. 315 U. S. 126, 86 L. Ed. 736 (1942).

"Infringement is not avoided by dividing an *integral element* of the patented machine into *two* or more distinct parts, so long as the function and operation remain substantially the same."

Kings County Raisin & Fruit Co., et al. v. United States Consol. Seeded Raisin Co., 182 Fed. 59 (C. C. A. 9);

Angelus Sanitary Can Mach. Co., et al. v. Wilson, et al., 7 F. 2d 314-319 (C. C. A. 9).

"Reissue patent No. 18,841, Claim 2, relating to Croquignole style of hair waving, was infringed, notwithstanding use of *one* clamp for *two* clamps disclosed in claim."

Johnson v. Philad., 96 F. 2d 442 (C. C. A. 9).

Addition of an Element to a Patent Claim Does Not Avoid Infringement of the Claim.

Defendants-appellees in dividing the platform (22) into *two* platforms (22) and connecting said *two* platforms, respectively, by *two* pitmen (59) instead of one, to a vibratory means (58) have not avoided infringement of Claim 1 of the patent in suit, because such an expedient *does not leave out* an element of said claim, but *adds another element* to the claim, to wit: a second platform (22).

“*Addition* to a patented machine or manufacture does not enable him who makes, uses or sells the patented thing with the addition, to avoid a charge of infringement.

* * * * *

“This is true even where the *added device facilitates the working* of one of the parts of the patented combination, and thus makes the latter perform its function with more excellence and greater speed.”

Walker on Patents (Deller’s Ed.), Vol. III, Sec. 460, pages 1693-1694.

“If an infringing device performs the same function as a patented device, *it is immaterial that it also performs some other function*. It is still, none the less *an equivalent of the patented device, and an appropriation of the patented invention*.”

Chesapeake & O. Ry. Co. v. Kaltenbach, 95 F. 2d 801 (C. C. A. 9, 1938).

“Where defendant in an infringement suit uses the principle and appropriates the *substance* of the *claim* in issue, the fact that it avoid the *letter* of the

claim by the addition of an unnecessary element does not prevent infringement."

B. B. Chemical Co. v. Ellis, 117 F. 2d 829 (C. C. A. 1, 1941), *aff'd* 314 U. S. 495, 86 L. Ed. 367 (1942).

Plaintiff's-appellant's case of infringement of Claim 1 of his patent in suit, Reissue No. 22,740, by the defendants'-appellees' accused sack jigger machines is conclusively proved by the Defendants' Answer to Plaintiff's Interrogatory XI [Pltf. Ex. 6] and by Finding of Fact XV, in which answer and finding defendants admit that they have made and sold an apparatus as shown in Plaintiff's Interrogatory Exhibits 3-3 (photographs) and as reproduced by the plaintiff's model designated by said exhibit number, as illustrative of the argument of plaintiff's counsel.

In the photograph of plaintiff's patented sack jigger machine, Plaintiff's Exhibit 8, defendants' sack jigger machine, Plaintiff's Interrogatory Exhibits 3-3 (photographs), and said Finding of Fact XV [Tr. p. 29], the parts or elements of Claim 1 of the patent in suit, Reissue No. 22,740, and the corresponding parts or elements in said Plaintiff's Exhibit 8, Plaintiff's Interrogatory Exhibits 3-3, Findings of Fact XV, and Plaintiff's Models of said Exhibits 8 and 3-3 are designated by the same reference numbers of the specification of said Claim 1 of said patent in suit, showing and proving conclusively that Defendants' Interrogatory Exhibits 3-3 contains all and the same elements of said Claim 1, and that defendants'-appellees' sack jigger machine shown in said Plaintiff's Exhibits 3-3 is in patent law a Chinese copy of and an infringement of Claim 1 of the patent in suit. Infringe-

ment of Claim 1 of the patent in suit by defendants' machine, Plaintiff's Interrogatory Exhibit 3-3, proves plaintiff's-appellant's charge of infringement, since it is only necessary to prove infringement of only *one* form of the defendants' accused machines to establish said charge of infringement of all infringing forms of the defendants' machines.

Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 S. Ct. 670, 35 L. Ed. 294.

Plaintiff's Interrogatory XI and Answer thereto are as follows:

“XI.

Interrogatory: Attached hereto and marked Plaintiff's Exhibit 3-3 is a photograph of a portion of one side of a sack jigger showing the mechanism for vibrating or jiggling the platform for supporting the sacks.

State whether you have made, used or sold a sack jigger, prior to the filing of this suit, containing the mechanism for vibrating or jiggling the platform for supporting the sacks, as shown in said Exhibit 3-3.

Answer: As nearly as can be determined by defendants from an examination of the two photographs, both marked *Exhibit 3*, attached to the interrogatories, the *defendants have made and sold an apparatus as illustrated therein.*”

The part of Finding of Fact XV admitting infringement of Claim 1 of plaintiff's-appellant's patent in suit, Reissue No. 22,740, is as follows:

“Each twin unit (1 and 2, or 1 and 3) comprises
* * * a plank, or platform (22) or table hingedly

(23) mounted upon the framework (1-11), this plank being suitable for the positioning thereon of a plurality of bags or other containers (34). A shaking means (58) is provided in the form of an electric motor driving an eccentric (56) which is coupled with a connecting strap (59), the opposite end of which is attached to the near end of the plank. The same motor (67) and eccentric (56) are utilized for powering two connecting straps 59 individually attached to adjacent ends of the planks (22) and consequently reciprocating both planks or platforms (22), illustrated in *Exhibits 3-3* attached to plaintiff's interrogatories which are plaintiff's Exhibit 5."

Defendants'-appellees' sack jigger machine, Plaintiff's Exhibit 11c (photograph) and Exhibit 13 (blueprint) [Tr. pp. 97-98] is the only sack jigger infringing machine of the defendants-appellees which was considered and incorrectly considered by the lower court [Decision, Tr. p. 20], but it is only *one* form of the infringing machines of the defendants-appellees, and while it [Pltf. Ex. 11c] evidently was designed to look as little like plaintiff's-appellant's patented machine as possible, all of the elements of Claim 1 of the patent in suit are obviously copied from said claim, and said accused machine, Plaintiffs' Exhibits 11c and 13, clearly infringes said Claim 1 of the patent in suit.

In the lower court's decision [Tr. pp. 20-21] the structure and operation of Plaintiff-Appellant's Sack Jigger, as embodied in Claim 1 of the patent in suit, Reissue No. 22,740, are grossly misstated by the lower court. For example the lower court [Tr. p. 20] says: "Element 1: Instead of a Pitman adjacent the platform, we find a cross bar [Exhibit 11c]; Element 2:

Instead of a central *open* locus, the accused device shows a board, not at center [Exhibit 11a]; Element 3: A rigid connection takes the place of one long board. (The jigger connection is at the end of the machine.)” Rationalization of such incoherent and senseless jargon is impossible. A cursory examination of Plaintiff’s Exhibit 11c clearly shows that there is a pitman adjacent the platform. The pitman is a long channel bar or beam, designated (59) on the near side of a thin partition and on the opposite or other side of said partition is mounted the platform or jigger board 22 close to said partition and as shown in Plaintiff’s Exhibit 13 (blueprint). Said pitman (59) is the most conspicuous element shown in Plaintiff’s Exhibit 11c, on the near side of said exhibit, and is spaced *horizontally forwardly of*, but *adjacent* the said *platform* (22) and partition at no greater distance than the pitman (59) is spaced *vertically above* but *adjacent* the *platform* (22), as shown in Fig. 1 of the patent sued on, Plaintiff’s Exhibit No. 2.

“Making rolls of a surface decorating machine *vertical* instead of *horizontal*, as in the prior art, is mere transportation of parts.”

Oxford General Motors, 120 F. 2d 44 (C. C. A. 6, 1941).

The so-called cross bar (60) of Exhibit 11c is certainly not a mere cross bar or a substitute for a *pitman* adjacent the platform (22), as the court incorrectly says that it finds, but said part(60) is pivoted at its near end to the frame post 8, and is connected at its far end to one end of the platform (22) which extends behind the longi-

tudinal partition of the frame of the machine, while the near end of an actual pitman (59) is pivotally connected to said part (60) between the ends thereof. As a matter of fact the part (60) of Plaintiff's Exhibit 11c, instead of being a cross bar, it is a *lever* of the *third class*, as any elementary text book on physics will show, and said lever is the *mechanical equivalent* of the bracket connection (60) of the patent in suit, between the pitman (59) and the platform or jigger board (22).

Examining Element 2 of the lower court's decision [Tr. p. 20], said court is incorrect in stating that Exhibit 11c, instead of a central open locus, shows a board, not at center [Ex. 11a]. Said statement does not make sense because it falsely implies that a board, not at center, eliminates the central open locus, which is shown at 1 at the extreme right of Exhibit 11c and at the center of Plaintiff's Exhibit 13. It is immaterial whether there is a central open locus or a board, not at center, because an *open locus* is only an *open place* and is not a tangible mechanical *element* of the claim in suit, which can affect the meaning of the claim, but is only any *open place* where a pitman should be connected to the platform or jigger board (22), to make the claim complete and operative. If the jigger board connection is removed to a non-central, or end locus, that is nothing but a transposition of parts which does not avoid infringement of the patent claim in suit.

Examining Element 3 of the lower court's decision [Tr. p. 20], that a rigid connection takes the place of

one long board, and that the jigger connection is at the end of the machine it is clear that the lower court does not understand the defendant's accused machine as shown in Plaintiff's Exhibits 11c and 13. The *rigid connection* of which the lower court speaks is evidently the long pitman 59, but it does not take the place of one long board or jigger board (22), which is shown at the rear of the partition in said Exhibit 11c, and is a separate and distinct element from said pitman. As for the jigger connection being at the end (or end locus), instead of a central locus of the machine that is also only transposition of parts and does not avoid infringement.

Referring to Plaintiff's Exhibit 12A, this accused defendant's machine is admitted by defendants in their Answer to Plaintiff's Interrogatory IV, Form 2. The motor and eccentric mechanism are located at *one extreme end* of the aligned platforms, which are connected at their inner ends by a *single connecting strap*, so that the aligned *platforms reciprocate as one platform*, like the single platform of appellant's patented machine. The connection of the jigger mechanism (58) to one *end* of the platform 22, instead of at a central open locus is nothing more than a transposition of parts which does not avoid infringement of the patent in suit.

Walker on Patents (Deller's Ed.), Vol. 3, p. 1699,
Sec. 463;

Bianchi v. Barili, 168 F. 2d 793 (C. C. A. 9,
1948).

Strong Proof of Infringement of Claim 1 of
Patent in Suit.

“To constitute infringement it is unnecessary to demonstrate substantial identity between machines to a mathematical certainty, but *infringement connotes correspondence as to the substantial dominant and essential elements.*”

Bianchi v. Barili, 184 F. 2d 793 (C. C. A. 9).

From the evidence a fair comparison of the defendants'-appellees' accused machines, with Claim 1 of plaintiff's-appellant's patent in suit Reissue No. 22,740, there will definitely be found *a clear correspondence of the substantial, dominant and essential elements* of said accused machines, to the same elements of Claim of said patent in suit, *which correspondence connotes infringement of said Claim 1* of appellees' Reissue Patent No. 22,740.

Defendants' answer to Interrogatories IV, VI and XI admit that they have made and sold a sack jigger machine that *performed the same function in substantially the same way to obtain substantially the same result* as that of appellant's invention, covered by Claim 1 of the patent in suit, Re. No. 22,740, which answers to said interrogatories are supported by the plaintiff's models of Plaintiff's Exhibits 3-3, 8 and 11c, and which models are adopted merely as a part of our argument.

“Appellee's ‘cover’ and appellant's ‘cage’ *perform substantially the same function in substantially the same way to obtain substantially the same result.* That they are called by different names is immaterial. *Bates v. Coe*, 98 U. S. 31, 42, 25 L. Ed. 68.”

Reinharts, Inc. v. Caterpillar Tractor Co., 85 F. 2d 628, at 631 (C. C. A. 9).

Judgment of Lower Court Is Contrary to the Evidence.

Finding of Fact XV [Tr. p. 29] supports the defendants' answers to Plaintiff's Interrogatories IV, VI and XI, which answers admit that the defendants' accused machines contain *every element* contained in the Claim 1 sued on of the patent in suit, Re. No. 22,740, and *correspondence of the substantial, dominant and essential elements of the defendants' accused machines, to those elements of Claim 1 of the patent in suit, connotes infringement by the defendants-appellees of said Claim 1 of the plaintiff's-appellant's patent in suit, Reissue No. 22,740*, as established by this Honorable Court in *Bianchi v. Barili, supra*. Infringement by the defendants-appellees is clearly established by Finding of Fact XV because said finding is supported by the evidence, and particularly by the defendants' answers to Plaintiff's Interrogatories IV, VI and XI, which answers of the defendants are *under oath*. The judgment of the lower court should have conformed to said Finding of Fact XV.

Finding of Fact XVII on the other hand denies all of the facts, which are overwhelmingly proved by the evidence, and flies in the face of Finding XV, and said *Finding of Fact XVII is contrary to the evidence, and is the only basis for the judgment of the lower court in the case at bar*. Finding of Fact XVII, being a *false finding*, the judgment of the lower court, based solely on said finding, is a *false judgment*, and should be reversed by this Honorable Court.

Finding of Fact XVII and the judgment based thereon violates Rule 52 (F. R. C. P.) in that said judgment is *not an appropriate judgment* according to said rule, be-

cause it is based on the *false Finding XVII*, and not on the *true Finding of Fact XV*, which *finds infringement* of the patent in suit by the defendants-appellees *in conformity with the evidence of the case*.

Violation of a rule of the F. R. C. P. by a District Court judge has been disapproved by the Supreme Court. In *McCullough et al. v. Hon. George Cosgrave*, 309 U. S. 634, 84 L. Ed. 992, the Supreme Court issued a mandamus requiring said judge to vacate his order under Rule 53(b) and appoint a judge, instead of a master, to hear a case.

In the case of *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 47 S. Ct. 286, 71 L. Ed. 481, at 483, the Supreme Court said:

“We shall therefore deny leave to file this petition, but are content to state our views on the general subject, with confidence that the district judges will be advised *how important we think these two rules are*, and that we intend, so far as lies in our power, to make them reasonably effective for the purpose had in view of their adoption.”

Ernst Patent Claim 1 Not Narrowed by Prior Art.

Defendants-appellees set up certain prior art paper patents to narrow the scope of the Claim 1 sued on of the patent in suit, but said paper patents were never used, or ever used for sacking potatoes like appellant's potato sacking machine.

Appellees praise the prior art which they have never attempted to use, but have used the appellant's invention and infringed the appellant's patent.

Diamond Rubber Co. v. Consol. Rubber Co., 220 U. S. 428, 441.

Conclusion.

Wherefore, appellant requests that the judgment of the District Court be reversed, as to the question of infringement of Claim 1 of the patent in suit, Reissue No. 22,740, and that justice be done in the premises.

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant.

J. CALVIN BROWN,

Of Counsel.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the appellant, and that in my judgment the foregoing brief is well founded and that it is not interposed for delay.

ALAN FRANKLIN.

No. 12323

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS, and H. G. McBRIDE, and A. G. CLEMENS,
and H. G. McBRIDE, doing business as IDEAL MANU-
FACTURING COMPANY,

Appellee.

REPLY BRIEF FOR APPELLANT.

ALAN FRANKLIN,

356 South Spring Street, Los Angeles 13,

Attorney for Appellant.

J. CALVIN BROWN,

704 South Spring Street,

Los Angeles 14, California,

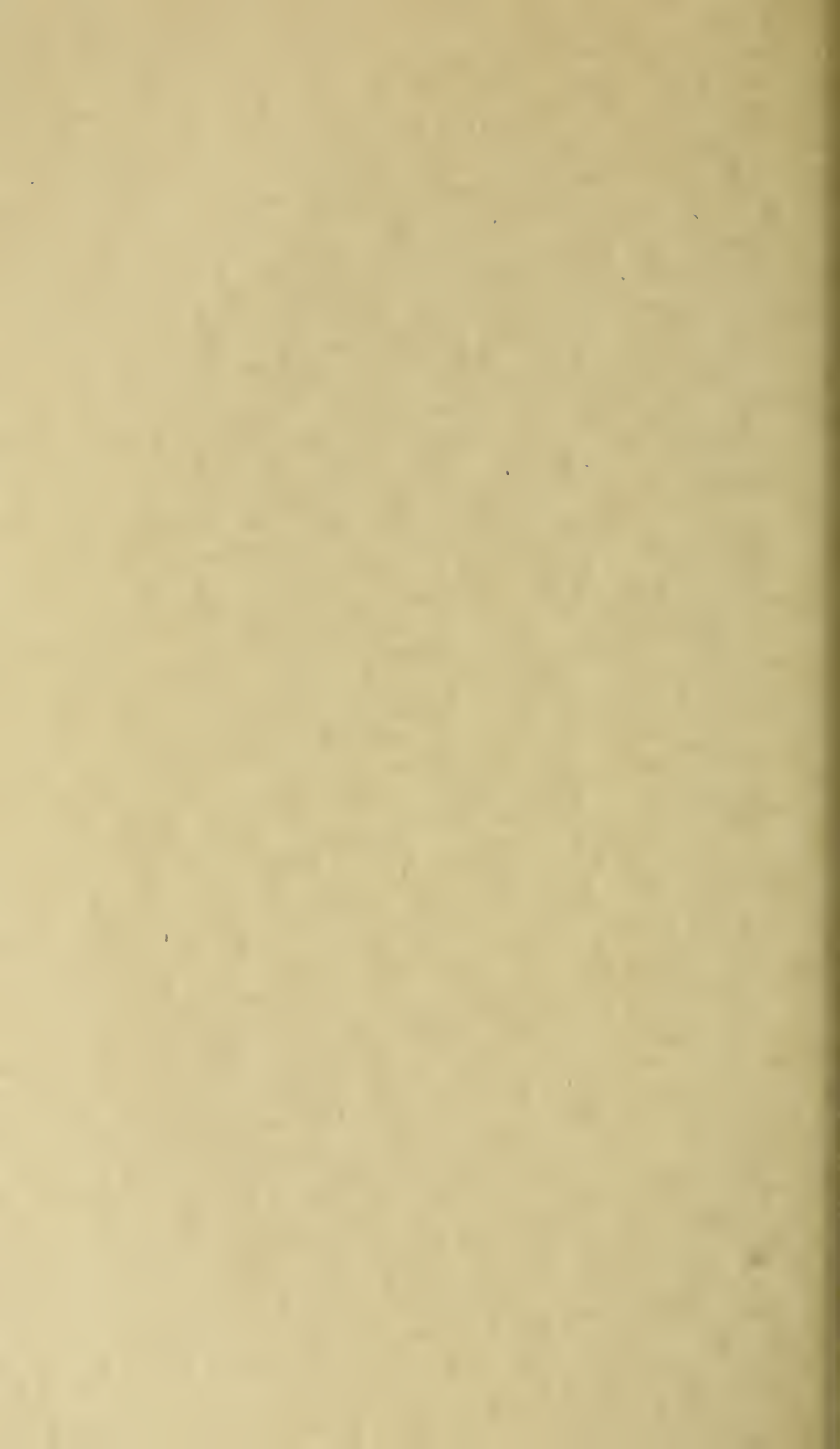
Of Counsel.

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PAUL P. O'BRIEN,

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Appellee.

REPLY BRIEF FOR APPELLANT.

Discussion of Chronology of Case.

It is interesting to note on pages 1 and 2 of the Brief for Appellees that counsel for appellees "do not find it feasible to correct inaccuracies or omissions in the discussion of the 'inventions in suit' contained in Appellant's Opening Brief (pp. 3-14)."

It would indeed not be feasible to correct any alleged inaccuracies or omissions contained in the discussion in Appellant's Opening Brief, page 3, under the heading "The Inventions in Suit," because there are no material inaccuracies or omissions in said discussion. Furthermore, said discussion of the inventions in suit in Appellant's Opening Brief is supported by Plaintiff's Exhibit 7, the photograph of the slow, but the fastest potato sacking machine in the industry, at the time Appellant and his de-

ceased brother came to Bakersfield in 1939 and invented their potato sacking machine, and said discussion is further supported by Appellant's patents in suit, by Appellant's potato sacking machines, Plaintiff's Exhibits 8, 9, and 10, and by the copying of the Appellant's inventions and infringement of his patents by the defendants-appellees.

The statement, on pages 1 and 2 of the Brief for Appellees, that appellee's chronology is supported generally by the "*uncontroverted*" testimony of J. Walker Glenn and Spencer Darby Day, is without legal significance, in view of the controlling fact that the testimony of said witnesses is "*uncorroborated*" by any documentary or any other evidence. The defendants' Exhibits A, B, C, D and E, referred to in the testimony of Spencer Darby Day, as machines of the Biloff or Sill type, are not prior art because the defendants did not start building said machines until 1946 [Tr. p. 107] after the patents in suit were issued or at least filed in the Patent Office. The F. J. Ernst patent No. 2,288,159 was filed Sept. 30, 1940 and the Ernst patent Re. 22,740 was filed originally on April 13, 1942. Appellant manufactured his machine covered by his patent No. 2,288,159 as early as 1940 [Tr. p. 91], and manufactured his automatic jigger covered by his patent Re. 22,740 as early as 1942 [Tr. p. 91], and since appellant's machines became very popular [Tr. p. 91] there is hardly any doubt that the defendants got their ideas for building their infringing machines, which appear in said Defendants' Exhibits A, B, C, D and E, from appellant's patented machines, Plaintiff's Exhibits 8, 9 and 10, rather than from the so-called Biloff or Sill machines. It is very significant that defendants have produced no documentary evidence illustrating the so-called Biloff and Sill machines

[Tr. pp. 107 and 109]. The witness Day only stated that the Defendants' Exhibits A, B, C, D and E were like the Biloff and Sill machines. It is also significant that Biloff could not obtain a patent in the potato-sacking art for his alleged machine, while the Ernst brothers did obtain patents in said art for their meritorious inventions (see Brief for Appellees p. 3).

Interpretation of Prior Patents.

The statement on page 2 of the Brief for Appellees that appellees' chronology is in several instances supported by the testimony of Plaintiff-Appellant's expert witness, Harry Gearing, is without foundation. Mr. Gearing testified as a mechanical expert from the patents in suit and the prior art patents. As for the Bradbury Grain Separator patent No. 826,988, to which Mr. Gearing testified [Tr. pp. 282 and 283] the hypothetical construction of filling the perforations of the screen 72 to form a platform, assumed by counsel for defendants to anticipate appellant's platform, cannot be considered as an anticipation of anything in appellant's patents, since the filling of the screen perforations to make a platform is not suggested in the said Bradbury patent. The applicable rule is stated in *Topliff v. Topliff* and another, 145 U. S. 156, 36 L. Ed. 658, as follows:

"It is not sufficient, in order to constitute an anticipation of a patented invention, that the device relied upon, might, by modification, be made to accomplish the function performed by that invention, if it were not designed by its maker, nor adapted, nor actually used for the performance of such function."

The Bradbury patent No. 826,988 is considered in detail in Appellant's Opening Brief, pages 62-63, and shown

to lack the essential elements of appellant's invention, as covered by his patent in suit, No. Re. 22,740, and to operate on an entirely different principle from that of appellant's sack jigger included in his said patent. The Bradbury patent shows *no jigger board* or platform on which *sacks* may be supported and *held stationary to receive potatoes*, to be jiggled by the horizontal reciprocation of the jigger board for *settling and compacting the potatoes in said sacks*. This novel concept of appellant's invention is not shown in the Bradbury patent or any other patent of the prior art set up in the answer, and consequently said prior patents are entirely foreign to appellant's invention.

It may here be noted that all of the prior patents set up in the answer are in different arts from the *potato-sacking* art in which appellant's patents are included, in view of the fact that all of said patents state that the machines disclosed therein are used for handling products other than potatoes, and there is no evidence that any of said prior patents were ever built and successfully used for sacking potatoes or anything else. The prior art patents are nothing but *paper* patents. A prior patent in *one art* is not a valid reference against a patent in *another art*, which accomplishes a *new* and useful result, like appellant's inventions, and particularly when the new result is not even suggested in the prior patent. *Topliff v. Topliff, supra*. Appellant's counsel at the trial of this case objected to the prior art patents, on the grounds that they are definitely located in different arts from the potato-sacking art, in which the patents in suit are located, but the trial judge overruled counsel's said objection [Tr. pp. 103-104].

Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co., 117 F. 2d 823, 825 (C. C. A. 9).

Trial Court's Basic Errors.

On page 4 of the Brief for Appellees, a statement from the trial court's decision [Tr. pp. 18-19] is quoted, as follows:

“In a situation like the present one, we are in between a veritable Scylla and Chrybdis. If we interpret the claims as they stand, there is no infringement. If, on the other hand, by resort to the specifications, we interpret them broadly and carry into the claims the elements which are not in them, we land the device in the prior art, and there is no invention.”

The above statement is nothing more than a futile attempt, by flashy rhetoric, to read out of the record the controlling facts and the law of the case. Said statement ignores the *major* contribution of appellant's inventions to the potato-sacking industry and ignores the *doctrine of equivalents*; and as for the alleged landing the appellant's device in the *prior art*, if the claims of appellant's patents are interpreted broadly, as they should be, we ask: “What prior art?” Where in the prior art is found appellant's shiftable baffle plates or shearers 52, of his Patent No. 2,288,159, arranged to be gripped *directly* by the operator standing adjacent one of the sacks alongside the machine, and moved by the operator, directly by hand, longitudinally of the conveyor belt from one sack to another, for directing the potatoes from a side edge of the conveyor belt into said sacks for filling said sacks successively with potatoes, until all of the sacks, arranged alongside the outer side edge of the conveyor belt, are filled with potatoes? And where in the prior art is found appellant's jigger board or elongated platform 22 of patent Re. 22,740, for jiggling and compacting the potatoes in the sacks supported on said platform at one side of a belt conveyor?

In every claim of every patent there is disclosed a *novel and inventive concept* of the patented invention, which concept is embodied in a *new combination* of elements, the particular construction of which elements may vary in form or construction so long as they perform their respective functions. The lower court could see only the particular elements of the combination of the claims, of the patents in suit, but could not see the *novel concept and combination of elements* of appellant's inventions, despite the uncontroverted evidence of the *new and highly useful results* accomplished by appellant's inventions. The lower court could not see the forest for the trees.

Construction of Patent No. 2,288,159.

Against appellant's patent in suit, No. 2,288,159, two prior patents were advanced as the appellees' best references, namely, Cunningham, No. 873,991, and Helenbolt No. 1,338,729 [Tr. p. 103]. Other prior patents were not advanced, because those advanced show the most. Said Cunningham and Helenbolt patents are carefully considered on pages 39-42 of Appellant's Opening Brief. It is clearly shown in said brief that neither of the machines of said two prior patents could be used for sacking potatoes. Moreover, said prior patents do not have the novel combination of elements of Claim 1 of appellant's patent in suit No. 2,288,159. And it is significant that neither of said patents, Cunningham nor Helenbolt, which counsel for defendants-appellees considered his best references, was cited against Claim 1 of said patent in suit, which is the claim sued on. Furthermore, no references or prior art were cited against said claim 1, which was claim 11 in the patent application.

In the Cunningham patent, No. 873,991, one of the appellees best references against appellant's patent No. 2,288,159, the wing-scraper blade 47 has to be *swung* on its pivot or shaft 44 by a slow, complicated mechanism, including a hand wheel 41, shaft 40, worm 42, worm gear 43 and pivot shaft 44, so that the straight rollers 36 and 37 and belt may be raised by a slow, complicated mechanism including a hand wheel 21, shaft 20, two gears 22 and 23, two racks 24 and 25 and arms 31 and 32, so that said rollers 36 and 37 may be moved over and past cone rollers 7 and 8 which are journaled in stationary uprights 2 supporting tracks 9 on which the Cunningham mechanism travels. All of the above complicated mechanism of said Cunningham patent is eliminated by appellant's simple and highly meritorious invention. The Cunningham machine was no doubt uppermost in the mind of plaintiff's expert, Harry Gearing when he stated that appellant's invention consisted in its very simplicity [Tr. p. 256]. The Cunningham patent does not disclose a baffle plate or shearer mounted to be moved along tracks *longitudinally* over a conveyor belt by the operator of the machine, from one sack to another for deflecting potatoes from said belt successively into sacks, as in appellant's sacking device covered by his patent in suit No. 2,288,159. Appellant's *potato sacking* device and the Cunningham unloading mechanism, patent No. 873,991, for handling *clay*, *coal* and other loose material, are entirely noncognate.

In the Helenbolt patent No. 1,338,729, appellees' other best reference against appellant's patent No. 2,288,159, the deflectors 28 do not *deflect potatoes into bags*, but deflect apples, oranges, and other fruit with tough skin onto screens for *grading* the same. If potatoes were deflected onto the screen in the Helenbolt *sorting apparatus* the deli-

cate skin of the potatoes would be bruised and scraped off and the potatoes would soon rot [Tr. pp. 58, 167 and 168]. The deflectors 28 in the Helenbolt apparatus are *not freely* mounted on tracks, so that they may be gripped *directly* by the operator of the machine at any point along the conveyor belt and moved directly by hand by the operator from one bag to another alongside said belt, as in appellant's invention covered by patent No. 2,288,159. In the Helenbolt apparatus the deflectors 28 are not gripped directly by the operator and moved by hand from one screen to another, but when it is desirable to move said deflectors from one position to another, it is necessary for the operator, if there were only one operator, to walk from the front of the apparatus around one end of the apparatus to the back of the same and turn cranks placed on the rear ends of the shafts 36 to rotate the pulleys 35 to draw the deflectors 28 along the conveyor belts 9 by means of the small belts or cables 33 and small idler pulleys 34, which belts are connected to said deflectors. (See Helenbolt patent No. 1,338,729, p. 1, second column, lines 103-110, and p. 2, first column, lines 1-37.) [Tr. pp. 166-167.] This Helenbolt machine is a *sorting* apparatus, not a *potato-sacking* machine like appellant's machine in suit. Most of the work of the Helenbolt machine is done by hand and it requires several men to operate it. Several men stand in front of the machine beside the barrels 19, and separate the culls, which are dropped into the chutes or funnels 20, while the desired grade of the fruit, such as apples, are put into the barrels 19 by hand. Another man stands in back of the machine and turns the cranks on the shafts 36 to move the deflectors 28 from one screen 16 to another. (See Helenbolt patent p. 1, first column, lines 12-28, and p. 2, lines 89-94, first column, lines 10-37.) [Tr. p.

168.] There is nothing in the Helenbolt patent that even suggests that it could be used for sacking potatoes, and the elements and construction of said machine definitely exclude the possibility of such use. Moreover, appellant's machine can be operated by *one* man only, and there is no suggestion in the Helenbolt patent that his machine could be operated by any less than two or three men at the front, and one man at the rear of the machine.

The patents to True, No. 1,369,502, Paisley, No. 1,818,427, and Vosler, No. 2,026,200, referred to on page 18 of Brief for Appellees are not included among the best references set up against Appellant's patent in suit No. 2,288,159 [Tr. p. 103]. The selected patents to Cunningham and Helenbolt have been considered in this brief. Said patents to True, Paisley and Vosler are not potato-sacking machines and offer no suggestion as to how they could be applied to such use.

Claim 1 of appellant's patent No. 2,288,159, specified "coupling means forming an acute angle with the sleeves so that the plate is positioned obliquely across the belt *for the purpose described.*" The "purpose described" appears in said patent on page 2, first column, in the paragraph in lines 19-30 as follows:

"One of the most important features of the invention will now be explained. Reference is made to the shiftable baffle plates or shearers 52 in the form of a panel having the *curved end* 53. One such shearer is provided for each passage just above the endless belts.
* * *

"* * * *The curved portion of the shearer extends far enough toward the open mouth of the sack to avoid unnecessary loss or damage to the article being sacked.*"

The curved ends 53 of the shearers 52 appear in Fig. 3 of the drawing of appellant's patent in suit No. 2,288,159 and extend outwardly over the outer edges of the conveyor belts 18 and 19 to a point just above the inner edges of the open mouths of the sacks 12, whereby the potatoes are directed by the curved ends 53 of the shearers into the mouths of said sacks, and none of the potatoes are lost or damaged by being misdirected by the shearers 52 and dropped outside of the sacks. *The curved ends 53 of appellant's shearers 52 are not found in any of the prior art patents set up in the defendants' First Amended Answer [Tr. p. 5]. Since there are no sacks supported alongside a belt conveyor in any of the prior art patents there are necessarily no curved ends of shearers extending to the open mouths of sacks for guiding the potatoes from the conveyor belts into such sacks. The curved ends 53 of appellant's shearers are embodied in the shearers of the defendants-appellees' machines as shown in Defendants' Answers to Plaintiff's Interrogatories VII and IX, Exhibits 1 and 2 [Supplemental Transcript of Record pp. 573 and 574].*

Infringement Only Issue.

While the prior art patents selected [Tr. p. 103] as best references against patent in suit No. 2,288,159 are considered somewhat in detail in this brief, it is not necessary for appellant to show that the patents in suit are valid over the prior art, because said patents are *held valid* by the lower court [Tr. pp. 17, 31 and 32]. The patents in suit being held valid, the *only issue before* this Honorable Court is the *question of infringement* of claim 1 of each of said patents, and the *gross error* of the lower court in *narrowly construing* the patents in suit, *contrary*

to law, and erroneously holding, contrary to the evidence, that the defendants-appellees' cheap-imitation machines do not infringe the claims in issue of the patents in suit.

Infringement of Patent No. 2,288,159.

Infringement, by defendants-appellees, of Claim 1 of appellant's patent in suit No. 2,288,159, is clearly shown in pages 23-33 of Appellant's Opening Brief, and also by the fact that the baffle plates or shearers of defendants-appellees' machines have the curved or bent ends 53 of the shearers 52 of appellant's said patent, as shown in Interrogatory Exhibits 1, 2 and the full view Exhibit 3 of Defendants' Answers to Plaintiff's Interrogatories. The curved or bent ends 53 of the baffle plates or shearers 52, shown in Fig. 3 of appellant's patent No. 2,288,159, are also shown clearly in *Plaintiff's* Exhibits 8 and 9, near the left end of the machine and in Plaintiff's Exhibit 11-B at the right end of the machine, and said *curved or bent ends* of the baffle plates or shearers of *appellees'* machine are shown in Defendants' Exhibits A, B, C and D. It will be noted that the baffle plates or shearers 52 in appellant's patent No. 2,288,159 extend obliquely across the conveyor belt to the *far side* of each sack 12 according to the direction of movement of the belt, and, to be operative, the ends of said baffle plates at said far side of the sacks are curved or bent backwardly to said far side of the sacks to make sure that the potatoes will be directed by the ends 53 of the baffle plate into the sacks; otherwise, if the plates were not bent and extended straightly obliquely of the belt to the far side of the sacks, many of the potatoes would be misdirected by the straight oblique plates over the far edges of the sacks and said potatoes would drop outside of the sacks and be lost or damaged. The state-

ment in Claim 1 of patent No. 2,288,159 that “the plate (52) is positioned obliquely across the belt for the *purpose described*” therefor, means that the baffle plates 52 are curved or bent at their ends 53 for the purpose of directing the potatoes from the conveyor belt into the sacks, and thereby preventing the straight oblique sides of the baffle plates 52 from misdirecting the potatoes outside of the sacks. Nowhere in the prior art is this curved or bent end 53 of appellant’s oblique baffle plate shown, but the defendants-appellees have copied it from appellant’s machines and have infringed Claim 1 of appellant’s patent No. 2,288,159, which specifies that the baffle plate (52) is positioned obliquely across the belt for the purpose described, or for the purpose of directing potatoes from the conveyor belt into sacks below a side edge of said belt.

An important test in determining the question of infringement of a patent, is *interchangeability* or noninterchangeability of *parts* of a patented machine and the parts of the alleged infringing machine. The appellant’s baffle plate or shearer 52 carried at its ends on *sleeves* and the appellees’ baffle plate or shearer carried at its ends on *trolleys*, are definitely interchangeable from the machines of one party to the machines of the other party.

Defendants’ answer to Plaintiff’s Interrogatory II states that in Form 1 of their machine the baffle plate is suspended from a *pair of rods* and that a *trolley* comprising a pair of sheaves mounted in a framework is arranged for rollable travel on each of the rods. From the framework vertically depends a suspension member, the lower end of which is bolted to the shear plate. The loose sleeves 54 and 55 on which appellant’s baffle plate or shearer 52 is mounted could be slipped on the *pair of rods* stated in De-

endants' Answer to Plaintiff's Interrogatory II so that appellant's baffle plate could be made to slide along said rods of defendants' machine over a conveyor belt, while the appellees' trolleys on which their shear plate is mounted could be placed on the rods 56 and 57 of appellant's sacking device shown in his patent in suit No. 2,288,159.

In Defendants' Answer to Plaintiff's Interrogatory II, Form 2 of defendants' machine, it is stated that *one end* of defendants' shear plate is bolted to a suspension member of the framework of a trolley which rolls along a rod, while the *other end* of said shear plate is mounted on a sheave which rolls along the upper edge of a plate secured to the side of the machine opposite the side on which the single trolley rod is secured. This form of *appellees'* shear plate unit could be placed in appellant's sacking device with the trolley on one end of said shear plate resting upon one rod 56 and the sheave on the other end of said shear plate resting upon the other rod 57 of appellant's sacking device of patent No. 2,288,159, and appellees' shear plate could be moved along said rods in appellant's device like the loose sleeves 54 and 55 of appellant's baffle plate or shearer 52, while one sleeve on the outer end of *appellant's* baffle plate or shearer 52 could be slipped on the single rod at the outer side of *appellees'* Form 2 machine, and *appellant's* other sleeve, on the inner end of his baffle plate could be split in half longitudinally on a horizontal diametrical plane and the lower half of said sleeve removed, leaving the *under-grooved upper half* of the split sleeve on the inner end of the baffle plate or shearer 52, which upper half of said split sleeve would fit over the *upper edge of the plate* secured to the *inner* side of appellees' said Form 2 machine, shown in Plaintiff's Exhibit 11-B, and in Defendants' Exhibits A and C.

The interchangeability of the baffle plates or shearers in the machines of the parties to this suit, as above described, shows clearly that the *trolleys, or one trolley and a sheave* for supporting appellees' baffle plate or shearer are merely colorable *mechanical equivalents* of appellant's *loose sleeves* on which his baffle plate or shearer is mounted, and unmistakably establishes the fact that *defendants'-appellees' sacking machines infringe appellant's patent* in suit No. 2,288,159.

Interchangeability of parts as a test of infringement of a patent has been recognized by this Court in the case of *Bianchi v. Barili*, 184 F. 2d 793 (C. C. A. 9th Cir.).

See also:

Walker on Patents (Deller's Ed.), Sec. 470, p. 1708;

Miller v. Eagle, 151 U. S. 186, 38 L. Ed. 121, 14 S. Ct. 310.

Construction of Patent No. Re. 22,740.

Three prior patents were selected at the trial by counsel for the defendants, as the best references of the defendants against the plaintiff's patent in suit, No. Re. 22,740, which prior patents are Bradbury, No. 826,988, Naeher, No. 1,719,124, and Erickson, No. 2,043,739. Other prior patents set up against said patent in suit in the First Amended Answer to Complaint, were not selected at the trial of the case. Neither the Bradbury nor the Naeher patent are file wrapper references, nor is the Erickson patent a file wrapper reference against the patent in suit No. Re. 22,740. The Erickson *et al.* patent No. 2,043,739 appears in Paragraph VIII of the First Amended Answer to Complaint [Tr. p. 7] as a file wrapper reference against

appellant's patent in suit No. 2,288,159. Said Erickson *et al.* patent is not advanced in the Brief for Appellees against appellant's patent No. 2,288,159, but is irregularly advanced against appellant's patent No. Re. 22,740 in said brief, page 26. The Erickson patent has nothing in common with either patent in suit, because it shows no mechanism for either sacking or jiggling potatoes.

The selected Bradbury patent is carefully considered on pages 62 and 63 of Appellant's Opening Brief, and is also considered in the first part of this Reply Brief for Appellant, under the heading "Discussion of Chronology of Case." It is shown that said Bradbury patent operates on an entirely different principle from that of Appellant's Sack Jigger covered by appellant's patent No. Re. 22,740, and that said Bradbury patent could not be used for sacking potatoes.

The Naehér patent No. 1,719,124 and the Erickson patent No. 2,043,739 are fully considered on pages 63, 64 and 65 of Appellant's Opening Brief. The Naehér patent and the Erickson patent both operate on different principles from those of appellant's patents in suit and are not capable of functioning to sack potatoes. The Naehér patent is for handling *grain*, not potatoes, and it has a *major vertical movement* and a minor horizontal movement. Said vertical movement in Naehér's machine would throw the potatoes up like a jumping bean [Tr. p. 163] and they would drop upon each other and become bruised [Tr. pp. 57, 58], while appellant's jigger board has a *major horizontal movement* which causes the potatoes to slip over each other and settle and pack in the sack without bruising each other. The lower court took judicial notice of this *novel* operation of appellant's invention

[Tr. p. 163]. The Erickson patent has no jigger board with *cleats* for holding sacks *stationary* thereon against longitudinal displacement, while said sacks are being filled with *potatoes*. The Erickson patent is for mixing and proportioning fruit and the product comes out of the apparatus in *liquid* form and not in the form of *bags filled with potatoes* as in appellant's machine.

From the foregoing analysis of the best references advanced against claim 1 of appellant's patent in suit, No. Re. 22,740, it should be obvious that there is no suggestion in any of said references of appellant's invention covered by said claim of said patent, nor any element in said references that could narrow the scope of said claim of appellant's said patent, to prevent reading of said claim on the colorable equivalents of the appellees' infringing potato-sacking devices or machines, as embodied in Exhibit 3-3 of Plaintiff's Interrogatories, and admitted in Defendants' Answer to Plaintiff's Interrogatory XI, and as shown in Plaintiff's Exhibits 11-A, 11-C, 12-A, and 12-B, and in Defendants' Exhibits A, B, C, D and E.

Infringement of Patent No. Re. 22,740.

Infringement of claim 1 of appellant's patent No. Re. 22,740 is clearly set forth on pages 46-58 of Appellant's Opening Brief, and more particularly element by element on pages 47 to 53 of said brief. There is no question that claim 1 of said patent in suit reads directly on the accused machines and devices of the defendants-appellees.

Counsel for appellees in his Brief for Appellees assert with emphasis that the question of infringement is a question of *fact* and should not be disturbed unless clearly erroneous, and counsel for appellant with no less emphasis asserts that before determining the *fact* of infringement

the court first looks into art and determines whether the invention has made a substantial contribution to the art and construes the patent, either broadly or narrowly, according to the state of the art and according to the *laws* of construction of patents to determine exactly what invention is covered by the claims of the patent. The *construction* of a patent is a question of *law* which must be determined before attempting to read a patent claim on an accused machine. Appellees' counsel would have this Honorable Court apply the issue claims of the patents in suit to appellees' accused machines, like the lower court did, without first construing said claims in the light of the *shortcomings* of the prior art and in the light of the *major contribution* made by the patents in suit to the potato sacking industry [Tr. p. 55], in order to determine the scope of appellant's claims to which he is lawfully entitled.

"In administering the patent law the court first looks into the art, to find what the *real merit* of the alleged discovery or invention is, and whether it has advanced the art substantially. If it has done so, then *the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves.*" *Eibel Process Company v. Minnesota and Ontario Paper Co.*, 261 U. S. 45, 63, 43 S. Ct. 279, 79 L. Ed.

Walker on Patents (Deller's Ed.), Vol. II, pages 1209-1212, Secs. 245-247.

On page 9 of Brief for Appellees appears the following statement of a rule of the Supreme Court:

"The rule requires that an Appellate Court make allowance for the advantages possessed by the Trial Court in appraising the significance of conflicting testimony and reverses only 'clearly erroneous' findings."

The above-stated rule does not apply to this Honorable Court in considering the testimony of plaintiff-appellant's patent expert Harry Gearing [Tr. pp. 202-297] whose deposition was taken in Los Angeles, California, before the trial at Fresno, California, and said deposition began on February 28, 1949, before Paul Lehnhardt, Jr., a Notary Public, and not before the District Judge, who was not present. The trial judge therefore, has no advantages over this Honorable Court in appraising the testimony of said expert witness, Harry Gearing, and this Court is not bound by any misconstruction of said witnesses' testimony either by the trial judge or counsel for appellee.

On page 14 of Brief for Appellees it is asserted without justification that the Ernst conveyor belt unloading device was at most a very *minor* contribution to a *crowded* and well developed field of endeavor. To said assertion we unqualifiedly demure. The patents set up in the First Amended Answer are in a *different art* from that of the potato sacking art and have no probative value in narrowing the scope of the claims of the patents in suit. The nearest approach to prior art is the slow machine, Plaintiff's Exhibit No. 7, which had no jigger board and could sack only 150 sacks of potatoes an hour [Tr. p. 87]. The plaintiff's expert witness, Gearing, did not say that the appellant's invention were in a *crowded* art and the defendants' witness, J. Walker Glenn, did not qualify as a patent expert [Tr. p. 103] and he testified that he had never seen the plaintiff Ernst's machine [Tr. p. 160].

Counsel for appellees advert to the file wrappers of the patents in suit, which file wrappers were not plead in the First Amended Answer. However, said file wrappers are

of no probative value in view of the fact that appellant's patents made a *major* contribution to the potato sacking art and are entitled to a liberal construction, and if, for the sake of argument only, said patents were given the narrowest construction possible they would still be broad enough to be entitled to equivalents such as the mere colorable equivalents of the defendants'-appellees' infringing machines, in which the accused baffle plates or shearers of the appellees, are interchangeable with the appellant's baffle plates or shearers, and in which the appellees' jigger mechanism for the jigger board perform the same function in substantially the same way as the *appellant's* jigger board reciprocating mechanism, the only *immaterial* difference being that in the accused machine of appellees the jigger board operating mechanism is placed at an *end* open locus and connected to one *end* of the jigger board instead of at a *central* open locus and connected to the *central* part of the jigger board as in appellant's machine, without change of function, mode of operation or result of the appellant's jigger board operating mechanism. Appellees' jigger board mechanism is nothing but a transposition of parts which does not avoid infringement.

Bianchi v. Barili, 184 F. 2d 793 (C. C. A. 9).

"It may be remarked that courts generally have been disposed to give much consideration to the fact that an applicant for practical reasons of expediency is often compelled to unduly narrow his claims while the application is pending, and in such cases *lean as far as possible in the direction of liberality* where the limitations imposed by the Patent Office appear to have been unwarranted. It may be noted that the

Court of Appeals of the Second Circuit *gives effect to limitations imposed by the Patent Office only in so far as an estoppel has been created.* Westinghouse Elec. Mfg. Co. v. Condit Elec. Mfg. Co., 194 Fed. 427 (C. C. A. 2),” and other cases cited.

Walker on Patents (Deller’s Ed.), Vol. II, Sec. 249, p. 1218.

“Any patent has some range of equivalents.”

Walker on Patents (Deller’s Ed.), Vol. II, pages 1209-1212, Secs. 245-247.

Eng. Development Lab. v. Radio Corp., 153 F. 2d 523 (C. C. A. 2) (1946);

Bankers Utilities Co. v. Pacific Nat’l Bank, 32 F. 2d 105, 107 (C. C. A. 9).

This case is on all fours with the case of *Oates v. Camp*, 83 F. 2d 111, which held:

“There can be no question but that claim 10 of the patent reads on this device. Defendant’s contention that the claim must be limited to the exact device disclosed by the specification and drawings cannot be sustained. As said by the Supreme Court in *Smith v. Snow*, 294 U. S. 1, 11, 55 S. Ct. 279, 283, 79 L. Ed. 721, these ‘show a way of using the inventor’s method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use, since the claims of the patent, not its specifications, measure the invention.’ ”

* * * * *

"We find nothing in the prior art to render claim 10 invalid; and, while we agree that it is to be interpreted in the light of the specification and drawings, we think, as thus interpreted, it is broad enough to cover any road guard such as that of defendant comprising a sheet band maintained under longitudinal tension and attached to supports by means of offset springs so as to make use of the principle embodied in the patent."

* * * * *

"And when the character of the invention is considered, it is clear that there is infringement of the other claims of the patent relied on, as well as of claim 10. We cannot agree with him or his experts that the patent is one for a mere improvement in a crowded art. * * * A study of these (prior) patents shows conclusively what is otherwise established by the evidence, *i. e.*, that prior to the invention of complainant, repeated efforts had been made to construct a satisfactory road guard but without success. Whether complainant's invention be termed a pioneer or not, it unquestionably solved a problem for the solution of which others had sought in vain and made a substantial contribution to the safety of those who travel the highways. In such case, the law is well settled that he is entitled to a liberal construction of his claims and a liberal application of the doctrine of equivalents, to the end that he may not be deprived of the fruits of what he has done."

Conclusion.

It is submitted that the judgment of the lower court should be reversed as to the question of infringement and that appellees' accused machines be held to infringe the patents in suit, and that appellant is entitled to his costs and such other and further relief as may be considered proper by this Honorable Court.

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant.

J. CALVIN BROWN,

Of Counsel.

Nos. 12,327 and 12,328

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY
(a corporation),

Appellant,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY
(a corporation),

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

C. W. DOOLING,

E. L. VAN DELLEN,

526 Mission Street, San Francisco 5, California,

Attorneys for Appellee

and Petitioner.

FILED

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(a corporation),

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and to
the Honorable Associate Judges of the United States
Court of Appeals for the Ninth Circuit:*

The Western Pacific Railroad Company, Appellee in the above-entitled cases, hereby petitions for rehearing in connection with the Opinion and Judgments rendered by this Court on August 25, 1950, and as grounds for such petition alleges that:

I.

The Court erred in holding that the occurrence of an appropriation as such word is used in the de-

murrage tariffs rests upon the intentions and understandings of the parties.

II.

The Court erred in holding that the presumption of lawful conduct coupled with the fact that no demurrage was charged on the cars involved requires the Court to presume that the parties understood and intended that such cars not be considered appropriated when taken from Appellee's tracks.

III.

The Court erred in disregarding the findings of the trial Court which were not "clearly erroneous" and in treating these appeals as though they were a trial *de novo* and, after such treatment, finding that the cars involved were taken and held by Appellant for the benefit of Appellee and subject to Appellee's control.

IV.

The Court erred in holding that it would be inequitable to hold Appellant liable for the demurrage charges sought and that, if the tariffs were applicable, then such tariffs were of questionable validity.

Dated, San Francisco, California,
September 22, 1950.

Respectfully submitted,

C. W. DOOLING,

E. L. VAN DELLEN,

*Attorneys for Appellee
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the above Petition For Rehearing is well founded and is not interposed for delay.

Dated, San Francisco, California,
September 22, 1950.

E. L. VAN DELLEN,
*Attorney for Appellee
and Petitioner.*

ARGUMENT IN SUPPORT OF PETITION.

I.

THE COURT ERRED IN HOLDING THAT THE OCCURRENCE OF AN APPROPRIATION AS SUCH WORD IS USED IN THE DEMURRAGE TARIFFS RESTS UPON THE INTENTIONS AND UNDERSTANDINGS OF THE PARTIES.

The basic premise upon which this Court rested its decision is that the time when the cars involved were appropriated, as that word is used in the demurrage tariffs, depends upon the intentions and understandings of the parties. While such an approach to the problem might be proper in the usual type of case it does violence to the well-established rules applicable to tariff problems.

The underlying philosophy of the Interstate Commerce Act and related statutes is that all patrons of a common carrier shall be placed on an equal footing. To accomplish this purpose the law requires that all services, privileges, facilities, etc., shall be covered by tariff publications, having the force and effect of law, which shall be uniform in operation and application. This purpose cannot be accomplished by tariff publications if it is possible to vary the interpretation of such tariff provisions between a particular shipper and a particular railroad by agreements, understandings, and intentions. Tariff provisions must be uniformly applied with no possibility of variation in application based on subjective matters such as understandings and intentions. This rule was well stated in the recent case of *Empire Box Corp. v. D. L. & W. R. Co.*, 171 F. 2d 389, where the Court, after pointing out that there must be "rigid adherence to the letter" of the demurrage tariffs, stated (p. 391):

“The regulations which govern the transactions of a great railroad—infinite in number and diversity as they are—demand speedy and certain application in practice, if the work is to go on as it should. Their incidence will often be harsh and unjust, and yet that may not be too high a price for smooth operation. The cost and delay in working out justice in the relatively few instances where their literal enforcement works injustice, may in the end involve more loss than gain.”

Tariff provisions must be certain in their application. To paraphrase the language of the Interstate Commerce Commission in the leading case of *Chrysler Corporation v. N. Y. C. R. Co.*, 234 I.C.C. 755 at 758, “to superimpose upon the demurrage provisions the necessity of considering the possible existence of” individual intentions and understandings, “would endanger the integrity of the rules and open them to possible abuse.” The basic approach to the problem adopted by this Court will create chaos in the railroad industry and leave the way open for great abuse in the application of the demurrage rules to the many many large industrial concerns having plant railroads*. Under this Court’s decision a railroad

*The Court apparently believes that the situation at Gerlach whereby Appellant used its own power to haul cars to the plant at Empire was unusual and existed “Because the private tracks of appellant would not sustain a regular freight locomotive”. Not only is there no evidence supporting the quoted language, but it is the exception rather than the rule for a railroad to do such switching on the tracks of a plant railroad. Not only do most large industrial plants do their own switching, as Appellant did at Gerlach, but also interchange tracks generally are supplied by such plants, not by the railroad. See the report of the Interstate Commerce Commission in *Ex Parte 104, Part II, Terminal Services*, 209 I.C.C. 11, and the multitude of supplemental reports in such proceeding.

station agent or other employe readily can avoid the application of demurrage merely by stating that the industry would be doing the railroad a favor if it would hold cars, intended for ultimate use by the industry, on such industry's tracks. Plants located far from supervision by officials of the railroad would gain a decided advantage and tariffs would be uncertain in application depending on what arrangements in derogation of the tariffs the local agent was willing or happened, to make. Additionally, whether such arrangements would be held to violate the tariffs or be perfectly proper might well depend on the happenstance of the wording of any letters written or statements made. For example, assume the only facts before this Court were that the Appellant with its own engine removed cars from Appellee's yard and hauled them to Empire where they were ultimately loaded and returned to Appellee together with billing instructions. In the absence of any further evidence could this Court hold that the appropriation rule did not apply and demurrage did not accrue for any period in excess of the free time computed from the time the cars were removed from Appellee's yard? Suppose, however, that an agent of the Appellee erroneously began computing demurrage from the time the industry began loading rather than from the time of appropriation and that this practice continued for many years. Would the fact that such agent and the plant's employees misunderstood the requirements of the tariff (and thus "intended and understood" that demurrage would not be assessed until such later time) in any way change the situation? Or suppose the railroad agent expressly agreed with the plant man-

ager that the demurrage records would be maintained to show the cars ordered and placed when loading began rather than when removed from Appellee's tracks, could it be contended that such express agreement not to charge demurrage (although the parties intended and understood that no demurrage would be assessed) made inapplicable the demurrage which would be applicable but for such agreement? Now, however, by the fortuitous circumstance that the agent might have made statements, or letters might have been written, suggesting an advantage to the railroad, the whole picture is different!! Under this Court's decision such statements estop the railroad from claiming that the cars were held for loading and thus subject to demurrage.

If the policy of the law is to be carried out, it just cannot be that the question of whether or not cars taken by a plant railroad onto its private tracks and held until loaded are subject to demurrage is to turn on the understandings and intentions of the parties as shown by occasional conversations on the station agent level. Any such understandings and intentions to be given effect must be contained in the tariffs. If any unusual situations exist which make desirable or necessary an exception to the tariff the proper procedure is a published exception to the tariff. Local understandings between station agents and plant employees cannot and must not be allowed to make such exceptions. The very tariff involved herein points out the proper procedure and makes an exception to the general rules under facts very similar to those at Gerlach. See Item No. 445 (Exhibit No. 1, Tariff 4-X, p. 38). This Item, applicable

on certain eastern railroads, covers the situation where an industry removes cars from interchange tracks by its own power and sets them out on storage tracks of the industry. In this situation on the specified railroads the express tariff exception provides that the time of appropriation shall be the time when the cars are removed from the industry's storage tracks rather than when removed from the interchange tracks as would be the case but for such express exception. Appellant in its various briefs through these cases (see, for example, Reply Brief p. 12) has insisted on misstating what this exception covers and keeps referring to the "fact" that such exception covers cars "pushed by the carrier on industry's tracks for the carrier's convenience". A reading of the exception shows such contention to be wrong—the exception was necessary because the cars were taken by the industry with its own power from interchange tracks and "set off by such industry's power on a designated track or tracks until required". The very fact that an exception was considered necessary in this situation shows that the tariff was considered applicable from the time the industry took the cars from the interchange tracks—just as it is applicable from the time Appellant took the cars from Appellee's tracks at Gerlach in the absence of a contrary "intention and understanding" *set forth in the tariff*.

The question of demurrage charges is not a question merely between an individual railroad and an individual shipper. As was pointed out in *Iversen v. United States*, 63 F. Supp. 1001 (affirmed 327 U.S. 767) such charges are not carrier charges or penalties but are "an integral

part of the established rules and regulations relating to the use and movement of cars''. The use and movement of freight cars is a matter of nationwide concern (see the various I.C.C. Service Orders in effect during the periods involved in these actions; for example, Revised Service Order No. 242, Exhibit No. 1, Tariff 4-X, Supplement No. 26). If the "intentions and understandings" of a local agent in Gerlach, Nevada, can make uncertain in application that which must, under the policy of the law, be certain in application, the same thing can be done by hundreds of local agents throughout the nation and the movement and supply of cars hindered to the damage of shippers and receivers of freight generally. If any exceptions are to be made they must be published in the demurrage tariffs where they are subject to scrutiny and control by the Interstate Commerce Commission which can suspend their effect and require that they be justified if it appears that the general public interest may be jeopardized.

II.

THE COURT ERRED IN HOLDING THAT THE PRESUMPTION OF LAWFUL CONDUCT COUPLED WITH THE FACT THAT NO DEMURRAGE WAS CHARGED ON THE CARS INVOLVED REQUIRES THE COURT TO PRESUME THAT THE PARTIES UNDERSTOOD AND INTENDED THAT SUCH CARS NOT BE CONSIDERED APPROPRIATED WHEN TAKEN FROM APPELLEE'S TRACKS.

In its Opinion this Court has given great, if not controlling, weight to a presumption of lawful conduct, holding that as Appellee over the years did not assess

demurrage computed from the time Appellant removed the cars from Appellee's tracks it must be presumed that the parties intended that no appropriation take place at the time cars were so removed, for otherwise a violation of the Elkins Act would have occurred.

It is difficult to see how such presumption can have any bearing in this case for before the Court can apply such presumption it must pick and choose which part of the law it wants to presume was not violated. In its Opinion the Court chose to presume that the parties were not violating that portion of the Elkins Act which made it unlawful to fail to collect applicable tariff charges. But the minute it is held that no tariff charges are due on the cars involved but that such cars were stored on Appellant's tracks for the convenience of the railroad until needed by Appellant, such finding runs afoul of that part of the Elkins Act which forbids the giving and receiving of concessions. Failure to collect applicable tariff charges is not the only matter covered by the Elkins Act. (See *United States v. Michigan Portland Cement Co.*, 270 U.S. 521.) It is clear that the placing and holding of a large supply of cars near Appellant's plant, with Appellant having the right to take such cars when and as needed, is an unlawful advantage not given to shippers generally and hence a violation of the law. See *61st Annual Report of the Interstate Commerce Commission* where it is said of such a situation (p. 76):

“One investigation of the practices of a carrier and shipper disclosed that an unlawful advantage was given by the carrier, and solicited and accepted by the shipper, through the placing and holding of

empty freight cars on the tracks of the carrier in close proximity to the plant of the shipper without charge and without tariff authority therefor. Prosecutions were instituted against both carrier and shipper. Upon pleas of *nolo contendere* each was fined \$12,000.’’

In any event, what this Court has done is to take the presumption of lawful conduct and use it in weighing the evidence to arrive at an inference. In other words, the Court has based an inference on a presumption and this, of course, is not proper. A presumption stands in the absence of any evidence on the subject but when evidence as to the factual situation is introduced “the presumption disappears from the case and the evidence is to be weighed without regard to the presumption”. (*British America Assurance Co. v. Bowen*, C.C.A. 10, 134 F. 2d 256, 259; *Wigmore on Evidence*, 3d Ed., Vol. 9, Section 2491, pp. 289, 290.) The facts of record in this case must be judged on their merits and the reasonable inferences to be drawn therefrom reached without regard to the presumption of lawful conduct. Under the approach used by this Court of determining “at the outset” that there was no appropriation because of the presumption of lawful conduct the whole case has been decided on the basis of such presumption.* The problem of “intentions” of the

*Having first held that whether or not an appropriation took place depended on the “intentions and understandings” of the parties the inevitable result of “at the outset” holding that there was a presumption that the parties “understood and intended” that the cars be not considered appropriated when taken from Appellant’s tracks is to decide the case wholly on such presumption and not to weigh the facts “without regard to the presumption”.

parties of necessity must always be an inference from the facts and thus under this Court's approach the presumption of lawful conduct would always prevail. The only way such presumption might possibly be overcome would be to show by the record of a criminal conviction that the parties were guilty of violating the law. If this Court's approach on the matter of the presumption of lawful conduct is to stand, then the Court should take judicial notice of official reports of the Interstate Commerce Commission (*Terminal R. Assn. of St. Louis v. Kimbrel*, C.C.A. 8, 105 F. 2d 262, 263, 264) wherein it is shown (61st Annual Report of the Interstate Commerce Commission, pp. 77, 155) that Appellee was convicted in the U. S. District Court, District of Nevada, on an information charging the granting of concessions by the improper assessment of demurrage charges and on an information charging falsification of demurrage records in connection with the practice involved in the present actions and where it is also shown (62d Annual Report of the Interstate Commerce Commission, pp. 81, 140) that Appellant was convicted in the same Court on an information charging the soliciting and accepting of concessions in failing to pay applicable demurrage charges in connection with the very situation involved in the present actions. While pleas of *nolo contendere* do not constitute an admission against interest yet the *fact* of conviction, whether based on such a plea or on a plea of guilty or after trial, certainly is relevant in overcoming a presumption of innocent conduct if the approach taken by this Court is proper.

III.

THE COURT ERRED IN DISREGARDING THE FINDINGS OF THE TRIAL COURT WHICH WERE NOT "CLEARLY ERRONEOUS" AND TREATING THESE APPEALS AS THOUGH THEY WERE A TRIAL DE NOVO AND, AFTER SUCH TREATMENT, FINDING THAT THE CARS INVOLVED WERE TAKEN AND HELD BY APPELLANT FOR THE BENEFIT OF APPELLEE AND SUBJECT TO APPELLEE'S CONTROL.

Having already decided the case under the presumption argument discussed above, the Court in its Opinion proceeds to the main question upon which the case was tried and decided in the lower Court and comes up with a resultant finding of fact contrary to that of the trial Judge who heard and saw the witnesses. In effect this Court has treated these cases as though Appellant was entitled to a trial *de novo* before it and has failed to give any effect to the findings of the trial Court as is required by Rule 52, Federal Rules of Civil Procedure. Before such findings can be set aside they must be found to be "clearly erroneous" and no such finding is justified. This Court states that "The conversations between the station agents, the practice of Appellee in not computing demurrage until the cars were spotted for loading, the letters written by Appellee's officers after the question was raised by the demurrage bureau" sustain an "inference" that "both parties regarded the cars stored on appellant's tracks as being held *for the benefit of appellee and subject to appellee's control*" and that any benefit to Appellant was an incidental benefit. Such inference is directly contrary to the findings of the trial Court that the cars were taken to Empire for the benefit of the Appellant. See the trial Court's statement (R. 335):

“There was, in my opinion as I got the evidence in the case, a situation which was just as much for the benefit of the defendant, to have these cars there, as it was for the plaintiff, even though the plaintiff got some benefit from that.”

While Judge Goodman found as a fact that the taking was for the Appellant's benefit with an incidental benefit to Appellee, this Court has just reversed the situation without the witnesses before it and has held that the real benefit was to Appellee and the incidental benefit to Appellant. Judge Goodman, with the witnesses before him, took a realistic view of the situation while this Court appears to make a very academic and naive approach. Appellant's contentions, which this Court has accepted, are so unrealistic as to be incredible. Under such contention we are to believe that out of the goodness of its heart a large industry engaged in business for profit, not only without payment or consideration of any kind but actually at considerable inconvenience and expense, furnished storage space for Appellee's cars, performed switching of such cars to and from the loading points, and (as the Court holds that the cars at Empire were subject to Appellee's control) was willing to haul such cars back and forth between Gerlach and Empire whenever desired by Appellee.

The Court's unrealistic findings are based on the proposition that Appellee was benefited because congestion in its yard at Gerlach was relieved. Under this argument demurrage could never be due under the appropriation rule for the same thing can be said of any private spur or plant railroad tracks. See *Granger v. Davis*, 2 F. 2d 695, where in a demurrage case the Court said (p. 697):

“It is clearly a private yard and not a general railroad facility * * *. That it facilitates the handling of freight, relieves the general yards and is advantageous to the railroad is beside the mark. The same is true in a greater or lesser degree of every private industry switch.”

In its Briefs Appellant has argued that this Court may, in effect, treat these appeals as a trial *de novo* because much of the evidence consisted of letters, depositions and admissions and thus the reason for the requirement of Rule 52, Federal Rules of Civil Procedure, is not present. But the primary basis of Appellant's contention in these cases was the oral testimony of Mr. Nottingham. Clearly this Court is in no position to substitute its judgment for that of Judge Goodman in passing upon the weight, or lack of weight, to be given to such testimony. So, too, in large measure the opinions and conclusions stated in the letters relied on by this Court were at variance with the testimony of Mr. Howell (R. 247 et seq.), who, it should be noted, was physically present at Gerlach several days a week during the period involved (R. 248) and not merely twice during the whole period as was Mr. Foster (R. 181) whose deposition was read and who wrote one of the letters relied upon by Appellant. Additionally, there is absolutely no evidence that the writers of the other letters were ever at Gerlach and familiar with the situation at such point. The trial Court was in a far better position than is this Court to compare and judge the testimony of Mr. Howell and weigh the letters in the light of such testimony. In view of such oral testimony it is not proper for this Court on appeal to treat the case as a trial *de novo* and disregard the findings of the trial court.

But even treating this matter as a trial *de novo* the holding of this Court is erroneous, for the only possible inference from all the evidence is that the cars involved were held at Empire for just one reason—to be loaded with Appellant's freight. At the outset it would seem that if the only evidence was that Appellant with its own power removed cars from Appellee's tracks and held them on its tracks at Empire until they were loaded the only possible result would be that demurrage was applicable computed from the time of such removal. What evidence has been relied upon to change this result? This Court refers to three different types of evidence: the conversations between the Appellee's station agents and Appellant's plant superintendent, the fact that the demurrage records kept by the agents didn't assess any demurrage, and letters written after the failure to assess demurrage was questioned. Undoubtedly the latter two were referred to merely as being confirmatory of the agreement and arrangement which is supposed (and the word is used advisedly for the result drawn from this testimony is pure supposition) to have been proven by the vague and general testimony of the plant superintendent (R. 135 et seq.). What was the agreement and arrangement? Did the agent specify certain cars which it was requested that Appellant store for Appellee? The Court apparently holds that all cars taken to Empire were covered by the agreement and arrangement. But the record does not support any such holding. An example of one of the so-called "car orders" (which in fact are not car orders requesting that something be done in the future but are recordings of something already done) is in evidence (R. 48) and covers thirteen cars of which only two came from the

“storage tracks” at Empire, the other eleven moving directly from Appellee’s Gerlach yard to the loading points. Clearly these eleven cars were appropriated for loading at the time removed from the Gerlach yard and yet Appellant’s “car order” treats them as being covered by the agreement and arrangement and specifies that the time for demurrage to begin shall be the day following such appropriation. As the agreement and arrangement was to relieve congestion in Appellee’s rail lines at Gerlach was it to apply when no such congestion existed? It is common knowledge that during the depression years there was not enough business on the railroads (and particularly on Appellee’s rail lines which went into receivership in 1935 (R. 123)) to create congestion of any kind. Yet according to Appellant’s argument and the Court’s holding this agreement and understanding was carried on during the entire period subsequent to 1926, including periods when there could not possibly have been any congestion. The plant superintendent admitted (R. 141) that “I don’t remember just how it was”—and that’s just the condition of Appellant’s argument and contention. Neither the testimony of Nottingham nor any other testimony or evidence shows what cars Appellant was requested to store for Appellee. In fact, the evidence as a whole discloses that Appellant came onto Appellee’s tracks and took whatever cars it desired—the selection was made by Appellant and Appellee did not know and could not know which cars Appellant “intended” to move directly to the loading platforms and which it “intended” at the time of taking to hold on its storage tracks. The whole situation was within the control of Appellant and it took and held such cars as suited its convenience and no others.

The Court's holding is based on the proposition that the storage on Appellant's tracks was for Appellee's benefit because it relieved congestion on Appellee's tracks. The Exhibits attached to each of the Complaints show that Appellant's storage tracks (exclusive of the loading tracks) would hold at least 45 cars, but such Exhibits also show that the daily average number of cars held by Appellant (exclusive of those on the loading tracks) during the period involved in these suits was approximately 20. How much congestion would 20 cars relieve when we are discussing railroad trackage with a capacity of nearly 400 cars? If the agreement was, as held by this Court, that the storage tracks should be, in effect, a railroad facility and the cars there subject to Appellee's control, why didn't Appellant make a real effort to relieve congestion by utilizing the whole capacity of such storage tracks? It is a significant coincidence that the average number of cars stored almost exactly equals one day's loading requirements of the Appellant. This inevitably leads to the conclusion that witness Howell was correct when he stated (Exhibit D, R. 286) that the Appellant did "not keep more cars at the plant than *they need to protect them against the failure of their engine or other causes*". The storage on Appellant's tracks was to protect Appellant's needs—not to relieve congestion on Appellee's tracks.

The fact that no demurrage was charged of necessity can be given no effect in determining whether the demurrage tariffs were applicable nor in determining whether the taking of the cars by Appellant was for the benefit of Appellant or of Appellee. In effect all the Court is holding here is that the cars must have been held

for Appellee's benefit for otherwise a charge would have been made for allowing Appellant to have them. But conversely it is just as logical to argue that the Appellant must have taken and held such cars for its own benefit for otherwise it would have required Appellee to pay a track rental charge for the use of Appellant's storage tracks and for the services rendered in moving the cars to and from such storage tracks.

Not only does this Court find that the cars were taken and held by Appellant for the benefit of Appellee but even goes so far as to make the unsupported assertion that such cars on Appellant's tracks five miles away were "subject to Appellee's control". Not one shred of evidence supports this finding. The record shows that during the entire period covered by testimony every car which Appellant took to Empire was loaded with freight and returned to Appellee for transportation of such freight. If as the result of past arrangements the storage tracks at Empire were railroad storage facilities used to relieve congestion certainly at some time Appellee would have exercised dominion over the cars stored and evidence would have been produced showing the exercise of control by Appellee over the cars at Empire. The Court's finding that the cars at Empire were "subject to Appellee's control" must be based on an argument that there was nothing to keep Appellee from requesting the return of the cars. Such argument is pure supposition. The fact is that no cars were ever returned except in the Appellant's service—loaded with Appellant's freight. This purely speculative finding is without any support in the record.

IV.

THE COURT ERRED IN HOLDING THAT IT WOULD BE INEQUITABLE TO HOLD APPELLANT LIABLE FOR THE DEMURRAGE CHARGES SOUGHT AND THAT, IF THE TARIFFS WERE APPLICABLE, THEN SUCH TARIFFS WERE OF QUESTIONABLE VALIDITY.

The Court's final argument in support of its judgment is that any other result would be inequitable and that if the tariffs were applicable then they would be of questionable invalidity. The inequity is said to lie in the fact that holding the tariff applicable would result in Appellant having to pay for a service rendered by Appellant to Appellee. Such holding, of course, presupposes that the taking and holding was for Appellee's benefit. Under the finding of the trial Court, which is not "clearly erroneous", no such inequity exists. Actually, the so-called equities of the case have no bearing on the question of the application of tariff provisions. If a tariff provision results in inequities or is illegal the remedy is provided by the Interstate Commerce Act and the matter must be presented to the Interstate Commerce Commission—a Court cannot grant relief. As was said by the Supreme Court in *Davis v. Portland Seed Co.*, 264 U.S. 403 at 425:

"The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rate specified."

In connection with this phase of the Court's Opinion it is rather surprising to find the Court citing and relying on *Indiana Harbor Belt R. Co. v. Jacob Stern & Sons*, 37 F. Supp. 690. This case stands completely alone and has never before been cited or followed by any court. It is contrary to Supreme Court decisions in holding that a

tariff provision may be held unreasonable or otherwise unlawful in a court proceeding. The principles adopted by the court in the *Indiana Harbor Belt Case* resulted in a holding that the tariff provisions involved were unlawful and unenforceable despite the fact that such provisions had long before been upheld as reasonable and lawful by the Interstate Commerce Commission in *International Agricultural Corp. v. A. & W.P.R. Co.*, 93 I.C.C. 189. In reaching its conclusion the *Indiana Harbor Belt Case* relied on an Interstate Commerce Commission decision which had been modified by such body in the above case. The question involved in the *Indiana Harbor Belt Case* was not new but had previously been before both the Courts and the Commission and in each of such prior cases the principles and arguments adopted by the Court in the *Indiana Harbor Belt Case* had been considered and rejected. See *Procter & Gamble Co. v. C.H. & D. Ry. Co.*, 19 I.C.C. 556; *Procter & Gamble Co. v. United States*, 188 Fed. 221 (reversed on other grounds 243 U.S. 281); *Pittsburgh, C.C. & St.L. Ry. Co. v. Freedom Oil Works*, 247 Fed. 573; *National Refining Co. v. St. L. & I.M. & S. Ry. Co.* (C.C.A. 6), 237 Fed. 347.

Dated, San Francisco, California,
September 22, 1950.

Respectfully submitted,

C. W. DOOLING,

E. L. VAN DELLEN,

*Attorneys for Appellee
and Petitioner.*

No. 12,414

IN THE
United States
Court of Appeals
For the Ninth Circuit

ANDREW FUGAZZI,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

APPELLEE'S BRIEF

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PAUL P. O'BRIEN
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HORACE B. WULFF

DEVLIN, DIEPENBROCK & WULFF

1212 California State Life Building
Sacramento 14, California

Attorneys for Appellee.

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IN THE

United States
Court of Appeals

For the Ninth Circuit

ANDREW FUGAZZI,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT OF PLEADINGS AND OF FACT

The appellant's opening brief does not set forth any concise abstract or statement of the case, including the issues made by the pleadings. A proper presentation of issues on this appeal requires such a statement.

A. Statement of Pleadings.

The plaintiff and appellant sought by his complaint to recover for alleged injuries suffered in the scope and course of his employment as a carman, working on the defendant's

rip (repair) tracks in the City of Stockton, State of California. The action was commenced under and by virtue of the Federal Employers' Liability Act. The complaint charged that defendant owed plaintiff but one duty, that is, "the duty of exercising ordinary care to provide plaintiff with a reasonably safe place in which to perform his work or service." Only one act of negligence was alleged against defendant, that is, that defendant "negligently failed to provide plaintiff with a reasonably safe place in which to perform his work or services in this—that * * * the said defendant * * * negligently required plaintiff to perform the services as aforesaid at a time when there was a sufficient amount of ice alongside said running board so as to make the place wherein plaintiff was working unsafe."

The charge of negligence was denied and the answer set up two affirmative defenses. One was that plaintiff himself was guilty of negligence in respect to the matters alleged in said complaint and that his negligence was the sole proximate cause of his injury, if any. The second defense was that of contributory negligence; that if plaintiff's own negligence was not the sole proximate cause of his accident, then it directly contributed to his accident and injuries.

The case was tried solely upon such issues as made by the pleadings.

At the conclusion of its case, the defendant made its motion for a directed verdict (R 275). The court in denying said motion stated that "the denial is deemed under that rule (50(b)) to mean that the court will submit the action to the jury subject to a later determination of the legal questions raised on the motion." Thereafter, the jury returned

a verdict in favor of plaintiff and against defendant in the sum of \$8,575.00 (R 16). Subsequently, and in the time allowed by law, the defendant filed a motion for judgment notwithstanding the verdict (R 17) and the trial court, Honorable Judge Dal M. Lemmon presiding, granted said motion. In so doing, the trial court rendered a memorandum of opinion (R 18) and also caused a formal judgment notwithstanding the verdict to be entered (R 21).

B. Statement of Facts.

Plaintiff, at the time of his injury, was an experienced car repairman and had worked for defendant in its Stockton yards continuously from June 28, 1944, to the date of his injury, the 8th day of February, 1950 (R 36). Defendant maintains in the City of Stockton a railroad yard for receiving and making up trains and for other railroad purposes, including the making of light repairs upon the rolling stock coming into the yard. In the City of Stockton, there is also maintained an interchange track where freight cars (enroute) are interchanged between various railroads operating in and about Stockton (R 192).

All freight trains coming into defendant's Stockton yards to be routed to or through are inspected for defects with specific reference to the cars' safety devices and appliances (R 136, 113). Upon the arrival of said trains, the cars are inspected for any defects by car inspectors who work in groups of two (R 105); and if defects are found, then such cars are tagged with a "Bad Order" card describing the defect (R 114). Cars in need of light repairs are then removed to the repair track (R 114). Heavy repairs are done elsewhere (R 194).

The car in question, to-wit, N.Y.C. 130765, was loaded with tin plate and originated in Rankin, Pennsylvania, and was routed Baltimore & Ohio Railroad, Missouri Pacific, Texas Pacific Railway, Southern Pacific Company via El Paso, Texas, to Stockton and then via Western Pacific from Stockton to its destination, San Jose (R 258). The car arrived in Stockton prior to 11:00 o'clock A.M. on the morning of February 7th (R 104) and was inspected by car inspectors Hensley and Trotter (R 105). They found that two of the nine to twelve boards (R 70) of the running board on top of the car were decayed or defective, and consequently, they placed upon the side of the car a "Bad Order" card showing defective running board (R 114).

A running board is a safety appliance under the Interstate Commerce Commission's regulations (R 137). A running board consists of a rough finished but painted board walk, three boards wide, down the middle of the top of a freight car (R 99). On this running board, each board was five and one-half to six inches wide. These boards were spaced about an inch and one-half apart (R 66) and so constituted a wooden walkway along the entire top of the car approximately two feet in width. Because of the defect in the running board (a safety appliance), the Interstate Commerce Commission regulations required defendant to effect repair before the car could be turned over to the Western Pacific Company at the interchange (R 137).

The car was then moved to the rip, or repair, track, where on the morning of February 8, 1950, at the commencement of the morning shift (7:00 o'clock A.M.), the carmen or car repairmen (who likewise work in teams of two, a carman and a helper) proceeded to make the repairs.

It is the practice in the Stockton yards that upon reporting to work, a car repairman and helper obtain their tools at the blacksmith's shop (R 193) and then go to the head end of the rip track. The first carman and helper arriving there would take the first car, and the next pair then would take the second car (R 92, 193). The carmen receive no instructions as to the type of repairs necessary, but ascertain that from the "Bad Order" card appearing on the side of the car (R 92, 193). The carman then inspects the car itself to determine the exact nature of the work to be done, and if he has sufficient knowledge and tools to repair the defect, he does so; otherwise, he consults his foreman and obtains instructions from him as to the proper method of repair (R 93, 193). On the morning in question, Mr. Fugazzi did not consult his foreman (R 61, 193).

Another custom existing in the yards was that each carman was delegated the duty to ascertain whether such repairs could be made with safety to himself. If in his opinion the work couldn't be done with safety, he was to advise the foreman and receive instructions as to how to proceed. If the work could be done with safety to himself, then the carman proceeded with the work (R 213).

On the morning in question, Fugazzi examined the "Bad Order" card on said car (N.Y.C. 130765). This card showed "B. O. R. Board" (meaning Bad Order Running Board), and showed that it was inspected by T. & H. (meaning Trotter and Hensley, two of the inspectors) on February 7, 1950 (R 43). Fugazzi then went up the ladder on the A end of the car (the opposite end from the B end, where the hand brake is situate (R 65)). At this time he had his hammer, but he had forgotten his chisel (R 44) and he went down to get it

(R 44). When he went up there the first time, he didn't see any ice upon the roof of the car. Then he procured his chisel and with hammer and chisel, he went again to the top of the car and walked down the running board until he got approximately to the middle (R 45). At that time, he saw ice on the middle part of the car, but no ice on the running board (R 45 and 77). Therefore, he saw the icy condition before he stepped off the running board (R 71). In the vicinity of the middle of the car he saw that one of the left boards of the running board was decayed and had to be replaced (R 84, 85).

Plaintiff testified that when he started to repair the decayed left hand board, he came to a crouch and had chisel in one hand and a hammer in the other. Then he got hold of the running board (apparently with the ends of his fingers since he was holding a chisel in one hand and a hammer in the other), and stepped back and off the board with both feet. A piece of the board he was to remove then gave way and his feet "gave at the same time" (R 71). In his direct examination, the plaintiff labeled the position holding onto the board he was to repair with his finger tips as being "a secure position" (R 46), but he did not explain how such position would remain secure if he was required to use one hand holding the chisel and the other hand hammering on the chisel in removing the board. Such an operation could not be done except by standing on the slippery metal roof without any hand hold or other security. In his deposition, the plaintiff did not mention holding onto the decayed board or the decayed board giving away but merely stated that he stepped off the running board to the metal roof with both feet and immediately slipped to the ground (R 82).

In his statement taken on February 9, 1950 (the day after the accident), plaintiff stated “* * * the only reason I got hurt was because I stepped off the wooden running board, yeah, I just forgot myself, don’t ask me why because I knew the top was wet with dew. I just forgot, that’s all! I could have stayed on the running board, certainly. Yeah, but the trouble is we all forget ourselves and make mistakes! Certainly, I should have stayed on the running board. * * * I slipped off the metal, yeah I wasn’t on the running board. If I’d stayed on the running board I’d have been alright, because you don’t slide on the running board.” (Exhibit C.) This statement will be further discussed hereinafter.

It was admitted that the weather condition at Stockton on the morning of February 8th was foggy. The fog started to form at 2:29 A.M. (R 177). The temperature at 12:28 A.M. on February 8th was 43°, and gradually became cooler until 6:27 A.M., when it was 34°, and the thermometer read as follows:

At 7:28 A.M.—32°

At 8:28 A.M.—32°

At 9:30 A.M.—36° (R 173)

Sometime between 6:27 and 7:28 A.M., the temperature fell from 34° to 32° and continued at the latter temperature until sometime after 8:28 A.M. The evidence as to temperature at the time of the accident is therefore inconclusive. The accident occurred at 7:10 A.M., so freezing temperatures may or may not have existed at that time. In his statement of February 9th, the plaintiff said that the top of the car was white with dew, at the trial he testified that it was icy.

Relative to the thickness and the nature of the ice on the metal top of the car in question, plaintiff's witness Kokonas testified that the ice was "the thickness of a paper, or about a thirty-secondth of a inch" (R 94), and the defendant's witness Dulgar testified that "the running was not icy or slick, but the roof of the car at the side of the running board did have a very thin coating of ice on it"—"the thickness of a piece of paper" (R 191).

Plaintiff testified on cross-examination that the ice was an inch or an inch and a half thick (R 70). But he also testified "I am not sure of it; I am not sure it was that. I am just guessing" (R 72).

Since the roof of the car was peaked, and sloped from the center of the car each way to the eaves (R 116 to 118), and since the slope from the top of the center of the car to each eave was an 8-inch drop in 4.25 feet (R 118), no water would stand on the roof. The only water that could have accumulated on the roof would have been moisture from the fog that existed for some five hours prior to the accident (R 177). Therefore, the physical facts demonstrate that the only ice that could have been present was this frozen dampness or moisture, and it could only be of a paper thickness.

Plaintiff further testified that a piece of the decaying running board approximately one foot or more in length pulled off of the running board (R 76).

After the accident and as soon as plaintiff was removed in an ambulance (R 191), the foreman, Mr. Dulgar, inspected the top of the car and found that the running board was not icy or slick, but that there was a very thin coat of ice on the metal roof (R 191). Plaintiff's witness, Emanuel Kokonas, went on top of the car about an hour after the acci-

dent and found the conditions to be as stated by Mr. Dulgar. Kokonas further testified that it was not necessary to stand on the metal portion of the roof to make the repair in question, and he, in fact, repaired it without standing on the metal roof, but by standing on the two remaining boards (R 96). He also testified that he found two boards defective, one in the left strip at "B" end of the car, and the other at the right strip at the "A" end (R 95).

Witness Dulgar further testified that the repairs generally made to the roof or top of box cars were the repairs of the running board, the roof hand holds or the longitudinal running board, and all of these repairs can be made while the repairman is standing on the running board (R 195). In detail, he testified that if one of the boards on the left hand side of the running board was to be removed, the work could be done either by standing on the remaining boards of the running board or by straddling the two remaining boards of the running board. He has never seen any hazard resulting from this method of operation (R 195, 196). We have already referred to plaintiff's statement taken on the 9th day of February, 1950, wherein he admitted that he knew and was fully informed that this board should have been removed by standing or squatting on the remaining two boards.

The explanation of this accident is clearly given by the plaintiff himself in his statement when he said: "* * * this is the first time I've ever got hurt on any job in fact there's nothing to explain on this, the only reason I got hurt was because I stepped off the wooden running board, yeah I just forgot myself, don't ask me why because I knew the top was wet with dew. I just forgot, that's all! I could have

stayed on the running board, certainly. Yeah, but the trouble is we all forget ourselves and make mistakes! Certainly I should have stayed on the running board." (The full statement of Fugazzi (Exhibit "C") is attached to and made an appendix to this brief).

Additional facts will be referred to during the course of the subsequent argument.

II.

THE FEDERAL EMPLOYERS' LIABILITY ACT BASES LIABILITY OF EMPLOYER UPON NEGLIGENCE ONLY AND THE 1939 AMENDMENT TO SAID ACT DID NOT CHANGE THIS REQUIREMENT FOR MAKING A CASE OF LIABILITY.

The Federal Employers' Liability Act is well known to this court. Its amendment in 1939 and the misinterpretation of a few of the decisions of the Supreme Court of the United States have occasioned attempts by attorneys invoking it to urge that the established rules of negligence and proximate cause have been altered or abandoned. A short review of the act, of the amendment of 1939 and the recent decisions of the Supreme Court will demonstrate that this is not so.

The act of 1908, 45 U.S.C.A. (Section 51), so far as it concerns liability of the employer, by its first section gives a right of action to an employee of a common carrier by railroad where the employee was injured while he and the employer were engaged in interstate commerce, if the injury resulted "in whole or in part from the negligence of the officers, agents or employees of such carrier" or by reason of defects in its operating properties due to its negligence. The 1939 amendment added a new paragraph to the first section (Section 51) *but left the first paragraph exactly as it*

read in 1908. However, the amendment abolished the defense of assumption of risk.

This had real significance, as we shall show. The decisions under the first and unchanged paragraph of the first section of the act, from 1908 to the time of the amendment in 1939, had definitely established that to recover the employee must show that his injury was proximately caused by the negligence of his employer. Liability was based upon negligence only and the act excluded responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.¹

We do not believe that it is necessary to consider all of these decisions of the Supreme Court, because in the concurring opinion of Justice Douglas in *Wilkerson v. McCarthy*, 336 U.S. 53, 93 L.ed. 497, commencing on page 70 (U.S. edition), all of the Federal Employers' Liability Act cases that reached the Supreme Court by petitions for certiorari are collected and listed. It is noted therein that of 55 petitions for certiorari filed during this period, twenty were granted. Of these, one was granted at the instance of the employer, and nineteen at the instance of the employee. In sixteen of these cases, the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In three of the cases, the lower court was sustained in taking the case from the jury. It is shown further that certiorari was denied in ten cases where the lower court withheld the case from the jury and rendered judgment for the employer.

1. *Seaboard A. L. R. Co. v. Horton*, 233 U.S. 492, 501, 58 L.ed. 1062, 1068; *B. & O. C. v. Berry*, 286 U.S. 272, 276, 76 L.ed. 1098, 1102; *Missouri P. R. Co. v. Aeby*, 275 U.S. 426, 429, 72 L.ed. 351, 354, and many other cases.

In *Wilkerson v. McCarthy* (decided January 31, 1949), plaintiff was injured when he fell into a pit while crossing it on a narrow greasy board. Though disputed, the evidence would have sustained a finding that the board was habitually used as a walkway, and hence the Supreme Court properly held a verdict directed for the defendant to be erroneous. A review of the majority and all of the concurring opinions will show, however, that all of the members of the Supreme Court were in accord with the proposition that the 1939 Amendment did not change the basis of the employers' liability. In the majority opinion, Mr. Justice Black stated at page 61 (U.S.):

"Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. *That proposition is correct, since the Act imposes liability only for negligent injuries.* * * * There are some who think that recent decisions of this court which have required submission of negligence questions to the jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, *Griswold v. Gardner* (C.C.A. 7th Ill.) 155 F.2d 333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337, 338. This assumption * * * is inadmissible." (Emphasis supplied)

Mr. Justice Frankfurter, with whom Mr. Justice Burton joined, filed a concurring opinion in which he stated his view that certiorari should not be granted in a case of this type, but, it having been granted, he agreed with the result. In the course of his opinion (page 64-5 (U.S.)) he said:

“It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury’s verdict could be fairly based. * * * The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.”

In the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Murphy and Mr. Justice Rutledge joined, it is expressly recognized that “the act did not make the employer an insurer. The liability which is imposed was a liability for negligence. * * * The basis of liability under the Act is *and remains* negligence.” (Page 70 (U.S.))

Since *Wilkerson v. McCarthy*, the Supreme Court has decided two cases under the Act, *Reynolds v. Atl. C. L. R. Co.*, 336 U.S. 207, 93 L.ed. 618 and *Moore v. C. & O. Ry. Co.*, 340 U.S. 573, 95 L.ed. 547. In both it held, as a matter of law, that plaintiff could not recover.

In the *Reynolds Case* a trainman was killed when he fell from a moving train. He was crossing from one car to another to give a signal. It was plain that the railroad negligently allowed canes to grow alongside the roadbed which required this action by the deceased, and also that he would not have been required to make this journey if the railroad had provided another brakeman. The Alabama Supreme Court conceded that negligence in the two respects charged appeared, but held that it did not appear that the accident resulted proximately, in whole or in part, from the negligence. The Supreme Court affirmed.

In the *Moore Case*, a trainman, who had been riding on the footboard of a locomotive, was run over by the locomotive. The claim was that he was thrown off by a sudden stop. The engineer testified that he saw the deceased fall and then brought the locomotive to a sudden stop. The Court, applying the rule of *Bunt v. Sierra Butte Gold N. Co.*, 138 U.S. 483, 485, 34 L.ed. 1031, 1032, held that if the engineer's testimony were disbelieved, such disbelief "would not supply a want of proof." In the course of its opinion the Court said:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. * * * We do not think that the isolated portion of the engineer's testimony relied on by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony totally at variance with such an inference. * * * To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof."

In an earlier decision subsequent to the 1939 amendment, *Brady v. Southern Ry. Co.*, 320 U.S. 476, 88 L.ed. 239, the Supreme Court stated with approval what had become the thoroughly established Federal rule under earlier cases in this regard:

"The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case be properly left to the discretion of the

trier of fact—in this case, the jury * * * (Citing cases). When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. * * * (Citing such earlier cases) The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. * * * Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller v. Atlantic Coastline R. Co.*, 318 U.S. 54, 67, 87 L.ed. 610, 617.”

With this background of the development of the construction of said act, we wish to examine the specific grounds upon which the court below granted the motion for judgment notwithstanding verdict in the case at bar.

III.

THERE IS NO PROOF THAT THE METAL SLANTING ROOF OF THE BOX CAR WAS A PLACE OF WORK, OR THAT PLAINTIFF WAS REQUIRED TO WORK ON SAID METAL ROOF.

The complaint charges but one ground of negligence, that is, negligently failing to provide plaintiff with a reasonably safe place in which to perform his work in this, that said defendant “*negligently required* plaintiff to perform the services as aforesaid at a time when there was sufficient amount of ice along said running board so as to make the

place wherein the plaintiff was working unsafe." Under the pleadings, therefore, plaintiff had the burden of proving that the place from which he fell was a place of work.

This charge of negligence presupposes either that the plaintiff was required to work on that portion of the car which was made slippery by the ice, or that it was necessary to stand on that portion of the roof in order to repair the running board. Further, this charge presupposes that the hazard or unsafeness was caused solely by the presence of ice. Plaintiff concedes that there was no ice on the running board (R 45), and so long as he was on the running board, he was safe (Exhibit C).

The evidence relative to whether or not plaintiff was required to stand upon the slippery slanting roof of the car first appeared in plaintiff's case, when his witness Kokonas testified that it was not necessary for one to stand on the metal roof when repairing the running board, but such work could be done, and Kokonas did do such work, by remaining on the two boards while removing the defective left hand board (R 96). Defendant's witness Dulgar confirmed the testimony of Kokonas; he testified that all of the work could be performed by staying on the two remaining boards of the running board (R 195) and if under some circumstances such work could not be so done, then the workmen should straddle the two remaining boards. Further, he had seen no hazardous results from such practice (R 196).

Dulgar also testified that it was not the practice for a carman, when repairing a running board, to stand on the metal part of the roof (R 208) and that he has never seen anybody standing on the roof to repair one of these running

boards when an icy condition exists (R 209). Further, that it was the practice to repair defective running boards during such weather conditions and that a "qualified mechanic would protect himself against the ice" (R 208).

Hence, the evidence stands undisputed that the left hand board could be removed and repaired by standing, squatting or sitting on the remaining two boards of the running board, and the car in question was in fact repaired in that manner by Kokonas. Plaintiff in his case adduced no evidence whatsoever from which it could be inferred that he was required to work on the icy metal roof. Such an inference was expressly negated by the following cross-examination of Dular:

"Q. (By Mr. Fried): And you consider it a safe practice for a man to work on the roof of a car with ice on it?

A. No man is required to work on a roof with ice on it." (R 207)

As shown by plaintiff's statement of February 9th, he also knew that it was not necessary to work on the metal roof with ice on it, and that the running board could be repaired while remaining on the two other boards thereof (Exhibit C). This statement was taken by Bernard G. Aguer, a claims agent for the Southern Pacific Company working on the hospital detail. Aguer testified that he calls at the Southern Pacific Company General Hospital daily, and upon his arrival, he has no knowledge that any accident has occurred or that any particular employee has been injured. He calls at the hospital office every morning and examines the admittance slips and checks them. As to those that "come as reportable I.O.D. cases, injury on duty cases,

I check their names for number of ward and number of bed and I proceed to call on those men" (R 234). He first ascertains from the attending nurse whether the patient is in a condition to be seen, and which he did before seeing the plaintiff on the morning of the 9th (R 235). He entered the ward. Plaintiff was confined to bed. He introduced himself and gave plaintiff his card and told him who he was and what he was there for. He explained the fact that he was interested in finding out just how he got hurt (R 237). The plaintiff told him that he was willing to give a statement. Aguer took the statement as the man gave it to him and wrote it to the best of his ability in the man's own style of speech. When he finished, he asked plaintiff to read it (R 238). Then he asked Fugazzi if the statement was satisfactory, if it represented what he told Aguer, and plaintiff stated that it did. Then plaintiff was asked if he had any objection to signing it. Plaintiff then proceeded to sign each page thereof before Mr. Aguer, who acted as a witness (R 238 and 239). This occurred between 12:30 and 1.30 on the afternoon of February 9th (R 235).

Plaintiff admits that said statement contained his signature on each page, but he does not remember signing it (R 86).

If appellant believed that any of the contents of the statement were incorrect or untrue, he would have testified to that effect. The appellant had ample opportunity to deny the contents or any part thereof. He was called as a rebuttal witness immediately following the completion of examination of witness Aguer, but he was not interrogated relative to said subject matter, and permitted it to remain uncontra-

dicted. If it be contended that the subject matter of this statement was disbelieved by the jury, then the testimony of both plaintiff's witness Kokonas and defendant's witness Dulgar confirmed the subject matter of said statement to the extent that he should have stayed on the running board while repairing the left hand board, and if he did, he would not have fallen off the top of the car. It is interesting to note that appellant on his rebuttal did not deny any of the testimony of either Kokonas or Dulgar, except that he was instructed never to use an acetylene torch on a loaded car.

Hence, we respectfully submit that the statement of February 9th constitutes an admission, the truth and correctness of which not only remains undenied, but stands confirmed by all of the other evidence on this subject.

In view of the uncontradicted testimony, it clearly supports the trial court's conclusion set forth in its memorandum opinion (R 18 to 20) where the court held that the plaintiff voluntarily adopted a method foolhardy under conditions *apparent to him* and carelessly neglected to follow a course which would readily appear to any one, even the unexperienced, to be safe. In other words, the court merely found, from all of the evidence, that which the appellant so clearly acknowledged in his statement of February 9th, when he said, "the only reason I got hurt was because I stepped off the wooden running board, * * * I just forgot myself, don't ask me why because I knew the top was wet with dew. I just forgot that's all. I could have stayed on the running board certainly. * * * I slipped off the metal, yeah, I wasn't on the running board. If I'd stayed on the running board I'd been alright because you don't slide on a running board."

The foregoing facts are analogous to the facts involved in *Detroit, T. & I. R. Co. v. Banning* (1949), C.C.A. 6th, 173 Fed.(2d) 752, Certiorari denied, 338 U.S. 815, 94 L. ed. 493. In that case, the appellant was a brakeman and a member of a switching crew which was making up a freight train. It had rained all day. The roadbed where he was working was covered with a thin layer of mud and the appellant got mud on his boots. In the course of his work he climbed on top of a moving car to a brake platform where it was his duty to operate the hand brake which controlled the speed of the box car. In so doing, he slipped from the car because of the mud upon his boots. The Court granted a directed verdict on the ground that the plaintiff did not establish that the defendant failed to furnish him with a safe place in which to work by directing and requiring him to work in the yard under muddy conditions so that his boots became slippery and covered with mud. As to whether the fact that plaintiff was required to work in the switching yards when the muddy conditions existed constituted negligence in failing to provide him with a safe place in which to work, the court on page 755 stated:

“The fact that appellee got mud on his boots while working during or after a rain is not in our opinion any evidence of failure on the part of the carrier to furnish the appellee a safe place in which to work. *Nor does the evidence show in any way that appellee was required to work thereafter without being afforded an opportunity to counteract any danger resulting therefrom.* He had ample opportunity while waiting on the engine to clean his boots of mud.” (Emphasis supplied)

In the case at bar, a direction to repair the left hand board of a running board on a cold and foggy morning did not constitute a direction or a requirement that he stand or work upon the icy metal roof, when a safe method of work was evident. Both plaintiff and his helper Kokonas knew that the running board itself was not slippery, and that one board could be removed while the workman stood upon the two remaining boards. Both of these men also recognized that the iron sloping roof was slippery. In the *Banning case*, the plaintiff elected to work with muddy boots when he could have cleaned them. In the case at bar, plaintiff voluntarily elected to stand upon the sloping metal roof with full knowledge of its slipperiness, and when he admittedly knew that his work could be done safely if he remained on the two running boards which were not slippery. Hence, the trial court correctly held that the slippery sloping metal roof was not a place of work where he was required to go to perform his said duties.

Therefore, the appellant has failed to prove his sole charge of negligence, that is, that the defendant negligently failed to provide plaintiff with a safe place to work by requiring him to perform his services at a time when there was "a sufficient amount of ice * * * so as to make the place wherein plaintiff was working unsafe."

IV.

NEGLIGENCE CANNOT BE PREMISED UPON THE PRESENCE OF FROST OR ICE UPON THE METAL TOP OF THE CAR UPON WHICH APPELLANT WAS WORKING.

It is an indisputable physical fact that during winter months in the City of Stockton, California, sloping metal roofs of freight cars become slippery, whether from mois-

ture deposited thereon by fog or rain or from frost or ice when such moisture freezes. The slipperiness of the metal roofs may vary depending upon whether the roofs are wet, frosty or frozen, but any of such types of weather condition would cause slipperiness and the dangers incident thereto. To avoid the slippery condition of the metal roofs caused by existing weather conditions, the railroad company has provided for the installation of running boards on top of the railroad cars, which extend for their entire length and are made of rough wood. If under any hypothesis it could be contended that the evidence supports a finding that the presence of such ice on the metal roof has rendered unsafe the place where plaintiff was required to perform his work, then any such hazard was solely caused by troublesome climatic conditions over which the appellee had no control.

Both before and after the 1939 amendment, the federal courts have continuously held that there is no liability under the Federal Employers' Liability Act for injuries caused by weather conditions; dangerous working conditions arising from temporary inclement weather do not constitute negligence on the part of the employer.

The leading case is *Missouri Pacific Railroad Company v. Aeby* (1928), 275 U.S. 426, 72 L. ed. 351. In this case the plaintiff (employee) slipped and fell on the icy platform at the defendant's station, while performing her services as station agent. During the night of the accident, it rained, froze and snowed. The steps of the station were covered with snow and ice and there was about three inches of snow on the platform. Going out at about 6:00 o'clock A.M. to perform her work, plaintiff stepped over the steps and platform but did not fall. When returning to the waiting room

she slipped on the ice and fell to her injury. Water which collected in a depression had frozen, and this was covered with snow. The Supreme Court of the United States in reversing a judgment for the plaintiff, held that the facts of the case when taken most favorably to plaintiff were not sufficient to sustain a finding that defendant failed in any duty owed to her. In the course of its opinion, the Supreme Court stated on pages 429-431 (U.S.):

“* * * Its duty in respect of the platform did not make petitioner an insurer of respondent’s safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances. *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 664, 45 L.ed. 361, 364, 21 Sup. Ct. Rep. 275; *Washington & G. R. Co. v. McDade*, 135 U.S. 554, 570, 34 L.ed. 235, 241, 10 Sup. Ct. Rep. 1044; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U.S. 189, 194, 30 L.ed. 1114, 1116, 7 Sup. Ct. Rep. 1166. The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. *Baltimore & O. R. Co. v. Groeger*, 266 U.S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. *Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. National Biscuit Co. v. Nolan*, 70 C.C.A. 436, 138 Fed. 6, 12. It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians,

that in similar weather are not materially unlike the place where respondent fell * * *” (Emphasis added)

“The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed to her. *Nelson v. Southern R. Co.*, 246 U.S. 253, 62 L.ed. 699, 38 Sup. Ct. Rep. 223. As negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of the respondent.”

The *Acby* case has been cited and approved several times after the 1939 amendment, and the principles therein announced have also been adopted after the amendment.

The first such case arising after the 1939 amendment is *McGivern v. Northern Pac. Ry. Co.* (1942), C.C.A. 8 Cir., 132 Fed.(2d) 213, which involved an action under the act for the death of a switchman, who received injuries while engaged in switching operations at the defendant's yard in Minnesota. It was snowing when the crew went on duty and there were five or six inches of wet, sticky snow covering the yard, and it continued to snow until approximately two hours prior to the accident. When the crew got the switch engine at the commencement of its shift, there was no snow on its footboard, but during the shift the freshly fallen snow was tracked onto the footboards by the members of the crew as they got on and off the engine. When last seen before the accident, decedent was standing near the outer edge of the footboard holding the switch list in his right hand and looking at it by the light of his lantern. He was found lying between the tracks and the marks on the snow indicated that he had been dragged. The defendant's motion for a directed verdict was denied and the trial court

submitted the case to the jury on three grounds of alleged negligence on the part of the defendant:

1. Failure to provide a reasonably safe place in which to work by allowing ridges and hummocks of ice to accumulate on the footboards;
2. Failure to furnish proper equipment and material to remove snow and ice from the footboards;
3. Failure to adopt any rule or custom and practice requiring removal of accumulation of snow and ice from the footboards.

In disposing of the first contended ground, to-wit, the failure to provide a reasonably safe place in which to work, the court on page 217 stated:

“It is first urged that defendant was negligent in that it failed to furnish McGivern with a safe place in which to work. It is the duty of the employer to exercise reasonable care to the end that the employee be furnished with a reasonably safe place in which to work and reasonably safe tools and appliances. The employer is not, however, the insurer of the safety of his employee, and the test is whether reasonable or ordinary care has been exercised by the employer in that regard. *Baltimore & O. S. W. R. Co. v. Carroll*, 280 U.S. 491, 50 S. Ct. 182, 74 L.Ed. 566. The steps on this switch engine were, when the crew began to use them, free of snow. The accumulation of snow and ice during the progress of the work was a natural and normal consequence due to the recently fallen snow in the yards. There were no inherent imperfections in these steps rendering them less fit for the use for which they were intended. It cannot be said that the situation did not present dangers but danger in a particular phase of an employment does not necessarily imply negli-

gence. As said by the Supreme Court in *Missouri Pac. R. Co. v. Aeby*, supra (275 U.S. 426, 48 S. Ct. 179, 72 L. ed. 351), "no employment is free from danger." The defect to form the basis for a cause of action must be one which implies negligence on the part of the employer, or those for whose acts he is answerable. * * * Snow and ice are due to climatic conditions incident to railway employment in wintertime in northern Minnesota, and it has been held by the Supreme Court of Minnesota that a railway company is not liable to its employees for injuries resulting from climatic conditions such as snow and ice. * * * (Citing cases.) The duty of providing a reasonably safe place in which to work and reasonably safe appliance with which to work while a continuing one does not obligate the employer to keep the place of work safe at every moment where such safety may depend on the due performance of work by the servant and his fellow workmen. *Kreigh v. Westinghouse C., K. & Co.*, 214 U.S. 249, 29 S. Ct. 619, 53 L. Ed. 984. * * * *Under the prevailing conditions which were perfectly obvious snow on the footboards could not have been avoided.*" (Emphasis supplied)

When the car in the case at bar was inspected on February the 7th, the day before the accident, there was no ice thereon (R 110). The weather was then above freezing (R 173), and continued to be thereafter until sometime between 6:27 and 7:28 A.M. of the 8th, when the thermometer dropped from 34° to 32°. The freezing temperature then continued through 8:28 A.M. (R 173). Since the accident happened at 7:10 A.M. on the 8th, the freezing weather either occurred shortly thereafter or shortly prior thereto and continued for over an hour after the accident. There-

fore, the situation was similar to that existing in the *McGivern* case, *supra*.

The next case chronologically, is the *Raudenbush v. Baltimore & O. R. Co.* (1947), C.C.A. Third Circuit, 160 Fed. (2d) 363. In that case, the plaintiff's intestate suffered fatal injuries while taking part in a shifting operation in defendant's yard, and action was brought to recover for his death under the Federal Employers' Liability Act. Decedent was serving as a brakeman of a yard crew and the crew had begun work at 10:30 in the evening, about an hour after a light snow had stopped falling. The instructions of the crew were to shove cars onto a certain track, couple them to cars already there and lay there and wait for a train. The cars which were to be coupled all had at least a light covering of snow. After the cars had been coupled and the train was standing motionless, decedent gave the engineer the slack signal for the purpose of enabling decedent to pull the coupling pin and cut the engine from the cars. This action seems to have originated with the deceased and was not covered by any instructions. The engine was cut and almost immediately thereafter the cars started to roll slowly to the east down a slight incline of the tracks. The conductor was walking towards the slowly moving engine. He saw a form go up and over, reach and grab for the gondola on its eastern end; he realized it was decedent. The next time he saw decedent, the latter's body was being rolled between the wheels of the gondola. An examination of the gondola showed a slip-mark or skid-mark on the brake sill, and it was inferred that decedent had run to the east end, had climbed upon it, had slipped while attempting to apply the brake of the gondola and had fallen between the cars.

The jury was charged with returning a verdict for the plaintiff if it found either of two sets of facts:

(1) that defendant was negligent in failing to remove the ice or snow from the gondola and that its presence was the proximate cause of the accident, or

(2) that the engine headlight should have been on when the cars started rolling. The jury returned a verdict in favor of plaintiff, but the trial court granted defendant's motion to set aside the verdict and judgment thereon and entered judgment for defendant. Plaintiff appealed.

One of the questions considered on appeal was whether the railroad was guilty of negligence in failing to remove any ice or snow which might have been upon the brake sill of the gondola. The court held that under the facts of the case, there was no negligence in this respect. In the course of its opinion, the court stated on page 366:

"It is a general rule of wide acceptance that since railroad companies have no control over the vagaries of the weather or climatic conditions that there is no liability for injuries resulting from the mere existence of ice or snow and disconnected from other circumstances. It is true, however, that a railroad company, like other employers, must furnish its employees a reasonably safe place to work. The phrase 'reasonably safe place to work' is a term of relative application. It does not mean the absolute elimination of all dangers, but the elimination of those dangers which could be removed by the exercise of reasonable care on the part of the employer.

The place of work here was a switch yard. It is a place of moving cars and locomotives and no reason exists why, within the confines of such yard, the employer should not be required to exercise a reasonable

degree of care to prevent an accumulation of snow or ice in such quantity and location as would constitute a menace to the safety of the employees in the performance of their various duties. The degree of care to be exercised by a party must have some reasonable relationship to the ability of that party upon whom the duty is cast to perform such duty. In this case we accept the statement of the learned judge that there were some 930 cars in the yard awaiting removal. The snowfall had ceased only an hour or hour and a half and had left a 'very, very thin coating.' While this case concerned the movements of only 14 cars, yet a somewhat similar duty would exist as to all other cars similarly situated.

* * * * *

We do not think that under the facts of this case, and particularly in view of the recentness of the storm and slight nature of the snowfall, *that any duty existed on the part of the railroad company to remove the light fall of snow from the area of the deceased's employment* and think no verdict could be based upon the violations of such supposed duty." (Emphasis supplied)

The last case chronologically is *Detroit, T. & I. R. Co. v. Banning* (1949), C.C.A. 6th, 173 Fed.(2d) 752. Plaintiff in this case was employed by defendant as a brakeman and at the time of the accident was working on a switchcrew which was making up a freight train. It had been raining all day. In performing a coupling operation, plaintiff walked around a roadbed which was covered by a thin layer of mud, getting this mud on his boots. At the time of the accident, plaintiff was on the brake platform and he contended that while making a flying switch he slipped off of the platform because his boots were slippery and covered with mud.

The trial court charged the jury in substance that plaintiff had charged defendant with negligence in two respects: First, that he was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud; and secondly, that defendant dropped the car upon which plaintiff was riding at such an excessive rate of speed that plaintiff could not bring it to a safe speed by means of the brakes provided. The jury returned a verdict for plaintiff and defendant's motions for judgment notwithstanding the verdict and for a new trial were overruled.

The Appellate Court reversed and remanded the case for a new trial, holding that the evidence was insufficient to go to the jury on the claim that *defendant was negligent in requiring plaintiff to work under muddy conditions*. Since the verdict was general, it was impossible to tell upon which claimed grounds of negligence the jury had based its verdict and therefore, the case had to be remanded for a new trial.

With reference to the claim of negligence relative to providing a safe place to work, the court stated that requiring employees to work under dangerous conditions resulting from temporary inclement weather was not negligence in and of itself, and in this regard, stated on page 755:

“The evidence respecting whether the appellant was negligent in requiring Banning to work under muddy conditions resulting in muddy boots which caused him to slip and fall from the brake platform was not sufficient to take that issue to the jury. *Troublesome or severe climatic conditions are commonplace in the year-round operation of interstate carriers. A temporary dangerous working condition resulting therefrom is not by itself a negligent failure on the part of the carrier*

to provide the employee a safe place in which to work."
(Emphasis supplied)

Thus, both prior and subsequent to the 1939 amendment to the Federal Employers' Liability act, the railroad is not liable for requiring its employees to work during temporary inclement weather and any dangerous working conditions resulting therefrom cannot, by itself, be the premise of liability.

In some of the cases hereinabove cited, it is indicated that in the event the snow fall or icy condition is very considerable and allowed to remain for an extended period of time, negligence may be premised not upon the inclement weather condition, but upon the employer's allowing the snow and ice to accumulate over an extended period of time. But the principle in these cases is that where the snow fall or icy condition is of slight nature or of recent occurrence, no negligence of the defendant can be premised thereon.

In the case at bar, the freezing weather was of recent occurrence, in that it commenced sometime between 6:28 and 7:28 A.M. The accident occurred at 7:10 A.M. and the freezing weather continued until 8:28 A.M. The only positive proof as to the quantity of ice comes from plaintiff's witness Kokonas and defendant's witness Dulgar, and both of said witnesses testified that the ice was the thickness of paper (or about 1/32nd of an inch). Further, the physical fact that the roof of the freight car slanted, compels the conclusion that the only water or moisture that could freeze on the roof was that which would not run off the slanting roof and which necessarily could be not more than moisture.

There is, therefore, no support for a charge of negligence based upon defendant's permitting the ice to accumulate

over any extended period of time. We are not concerned here as the court was in the *McGivern* case, *supra*, with any alleged negligence of the defendant in failing to furnish proper equipment to remove ice and snow from the rolling stock, because the complaint made no such charge nor was any attempt made to prove it.

V.

THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS APPELLANT'S VOLUNTARY ACT OF DOING HIS WORK IN A NEGLIGENT MANNER WHEN A SAFE METHOD WAS AVAILABLE.

Appellant concedes that before he stepped from the running board, a safe place, onto the metal roof, he knew that the metal roof was covered either with moisture (see Exhibit C), or with ice (R 71). Appellant was an experienced carman, with practically six years experience in the Stockton yards. Further, in his statement of February 9th, he admitted that he could have done this work by staying on the running board or as stated by him in such statement, "If I had stayed on the running board I'd been alright, because you don't slide on the running board." (See Exhibit C and appendix.) The situation at the moment of the accident in the case at bar was similar to that involved in the *McGivern* case, *supra*, where the court on page 218 stated the facts confronting McGivern:

"It appears from the evidence that he rode the switch engine from the west end of the yards to the point where a string of cars were coupled onto a locomotive, a distance of about 1,600 feet. When the cars were reached the switch engine stopped. McGivern could then, had he thought it necessary or advisable, have

cleaned or sanded the footboard. However, he got back on the footboard and returned riding the engine to the west end of the yard. Having thus ridden the footboard for a distance of 1,600 feet he was in a position to know whether it required cleaning. If it did he should have cleaned it, or have the other members of his crew do so."

The appellant here likewise was fully apprised of the danger caused by the moisture or by the icy condition, and also he knew that it was not necessary for him to work upon the icy roof, and that the running board provided him a safe place to perform the repair. Does the voluntary abandonment of the known safe method and the adoption of an obviously dangerous method impose any liability upon the employer? In the *McGivern* case, the court held (at page 218) that:

"The defendant could not anticipate that McGivern would not exercise proper care for his own safety and we can only conclude in view of his knowledge and experience, that he did not believe the footboard required cleaning."

The court on page 219 further stated:

"As said by the Supreme Court in *Aerkfetz v. Humphreys*, 145 U.S. 418, 12 S. Ct. 835, 836, 36 L. Ed., 758: '*It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected.*' In *Chesapeake & O. Ry. Co. v. Nixon*, 271 U.S. 218, 46 S. Ct. 495, 496, 70 L. ed. 914, a section foreman while riding a motor car was overtaken by a train. The court, holding that he should have relied

upon his own watchfulness and kept out of the way of the train, said: '*The Railway Company was entitled to expect that self-protection from its employees.*' But it is said that conceding McGivern's negligence it was only contributory negligence and hence not a defense. There can, of course, be no contributory negligence, properly speaking, unless there is negligence on the part of the defendant. Here the negligence was that of McGivern alone. It was his failure to act that resulted in his injury and defendant cannot be held liable therefor." (Emphasis supplied)

The appellee in the case at bar, not only had the legal right to expect self-protection from its employees, but it further delegated to the carmen themselves (including the appellant), the duty of determining whether the repair work can be done with safety or not. If in appellant's judgment he could not do it safely, nor decide in his own mind how to do it safely, then he should consult his foreman (R 214). In the case at bar, appellant admittedly did not consult his foreman (R 61, 193).

Lasagna v. McCarthy, 177 Pac. 2nd 734 (Cert. den. 332 U.S. 829, 92 L. ed. 403) involved an experienced carman and inspector working in the switching yards of a navy depot, who did not elect to follow the employer's blue flag rule, but followed a "look out" method, that is, if one man went between or over the cars, the other man watched for approaching trains or cars. At the time of plaintiff's injury, both men went underneath the cars. In holding that the employee could not recover under the act, the court on page 740 stated:

"Even granting that the place was rendered unsafe by this violation of the 'blue flag' rule, *the respondent*

himself had a better opportunity than the appellants to know of the increased danger. He controlled the means by which the place could be made safe, and his own failure to properly perform his work was the only reason the place was rendered unsafe.” (Emphasis supplied)

Here, the appellee could not be charged with negligence in failing to anticipate that appellant would disregard this safe method and adopt a dangerous method, when the icy condition prevailed, and particularly so when the foreman had never seen this safety practice disregarded (R. 209).

In *Eckenrode v. Pennsylvania R. Co.*, 164 Fed.(2d) 996; affirmed 335 U.S. 329, 93 L. ed. 41, the court held that for the employer to be held liable for negligence under the act in failing to take precautions, there must be some danger to which these precautions should be directed. The court held in that case that no such danger existed, for there was nothing in the decedent's conduct to give notice to the engineer of any possible dangers. On page 1,000, the court stated:

“* * * It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpected and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained.”

The only precaution that respondent could have taken in the case at bar would have been to send a guard to the roof of this car to stop or prevent appellant from “acting in a wholly unexpected and unreasonable fashion,” that is,

from stepping from the running board to the slippery metal roof.

Reference is also made to *Atlantic Coast Line R. Co. v. Dixon* (1951), C.C.A. 5th Circuit, 189 Fed.2d 525, which was an appeal from a judgment recovered by plaintiff below, suing under the Federal Employers' Liability Act for personal injuries. The injuries resulted from an electric shock received by him when he mistakenly plugged the connection of a portable electric light cable into the outlet of a power circuit carrying a 440-volt current. He had intended to plug into a lighting circuit carrying only 110 volts, the outlet of which was located some 26 feet away. In reversing the judgment, the court on page 527 stated:

“It is of course the duty of an employee to exercise reasonable and ordinary care for his own safety. If the employee's negligence was the sole proximate cause of his injury, he can not recover. * * * Temporary conditions produced by the employee negligently using or negligently failing to use, appliances provided by the employer, are not defects for which the employer is liable. *Wood v. Davis*, 5 Cir., 290 F. 1. *Nor is it actionable negligence that an employer fails to anticipate lack of care on the part of an employee. McGivern v. Northern Pac. Ry. Co.*, 8 Cir., 132 F.2d 213.” (Emphasis supplied)

The principle in the *Dixon* case is applicable to the case at bar, in that appellant herein mistakenly or without thinking, stepped from the safe running board onto the icy metal roof when he well knew all dangers incident thereto, and also well knew that his work should have been done on the running board.

Appellant, in his brief, makes many unsupported statements, such as the following:

(a) That there is not one word of evidence in the record from any of the defendant's witnesses that the method used by the plaintiff was wrong or violating any rule of the defendant. (Appellant's brief, page 9.)

(b) That it was physically impossible for plaintiff to stand on the running board and at the same time, repair it. (Appellant's brief, page 10.)

(c) That there is positive evidence that appellant used all the careful methods necessary for his own safety in performing his work, and was injured by slipping on the icy surface of the car top because of the negligence of the defendant. (Appellant's brief, page 21.)

Plaintiff's witness Kokonas testified that if a man wasn't careful, he could slip on the ice upon the top of said car and further, that "a man can slip off a car even when it is wet and without ice" (R 90). He also testified that it was not necessary for one to stand on the metal portion of the roof in order to repair the specific running board in question but it could have been *and was repaired by him by standing on the remaining two boards of the longitudinal running board* (R 96). This was admitted by plaintiff in his statement of February 9th and was confirmed by witness Dulgar (R 195, 196). All of the evidence was in direct conflict with plaintiff's statement that it was physically impossible for him to stand on the running board and at the same time repair it (R 10). This is particularly true since the repair is merely the replacement of one of the three boards, so that the two remaining boards remained an ample and safe place in which to work. In light of the

physical facts concerning the dimensions of the running board, and the fact that the repair was performed without stepping off onto the roof, plaintiff's statement that it was impossible is inherently insufficient to support the verdict.

Lastly, the plaintiff is seeking to hold the appellee negligent in failing to anticipate that an experienced repairman would stand upon the ice encrusted car top. Appellant had the same knowledge that he is trying to impute to the defendant, and had obvious means of avoiding all hazards therefrom by doing his work from the running board. Appellant has overlooked the proposition that if the work, as here, is simple in character and free from complications and complexities, the employer is under no obligation to adopt any rule with reference thereto. *McGivern v. Northern Pac. Ry. Co.*, 132 Fed.(2d) 213 at 219. Nor is there any duty to give notice to the employee of simple dangers, such as the likelihood of slipping on the ice encrusted metal roof of a box car. *Missouri Pacific Railroad Company v. Aeby*, supra. Therefore, it is apparent that the only possible conclusion from the undisputed evidence is, as the appellant himself characterized it in his statement, that he forgot himself and made a mistake. No negligence on defendant's part can be premised on this mistake of appellant, nor in failing to anticipate the negligent conduct of an experienced employee.

VI.

NO NEGLIGENCE CAN BE PREMISED UPON THE FAILURE TO APPLY SALT AND/OR SAND TO THE ROOF.

At the trial appellant contended, and as we read his brief on appeal he still contends, that Dulgar, his immediate superior, "should have adopted some safe method to make

the icy metal roof a safe place to work on and a safe procedure would have been to put sand and/or salt on the icy metal roof." Since the metal part of the roof was not a place of work, as demonstrated above in this brief, there was no obligation to remove the ice or moisture from the latter in order to provide a reasonably safe place in which to work.

Even if we concede for the purpose of argument that it was necessary to stand on the icy metal roof to perform the work then the question arises whether or not any negligence could be premised upon the fact that sand and salt was not placed upon said thin coating of ice. On page 6 of Appellant's brief, it was stated that Wayne E. Wise was General Chairman of the Joint Board of the defendant corporation railroad, and it is inferred that he was an employee of defendant. Such is incorrect. Wise is a general chairman of the Brotherhood of Railroad Carmen of America (R 121). Mr. Wise had had no experience in performance of the work in question except what he gained as an apprentice for Western Pacific prior to 1931. Thereafter he worked for the Pacific Fruit Express Company as a car builder (R 124). Then he started in 1936 as a steel carman in the defendant's shop in Sacramento (R 124) and in October 1942, he became local chairman of the Brotherhood (R 125). We do not believe that he was qualified as an expert, and further believe that his testimony hereinafter mentioned does not inferentially or otherwise prove any negligence on behalf of the defendant in the instant case.

Mr. Wise was asked whether he made studies in the problems presented where cars had icy roofs, to which he replied "Yes" (R 129), and he further testified that "we found that

icy conditions are best overcome by the use of salt or sand sprinkled on the roofs of icy cars." (R 131) The only place he mentioned at which they practiced this was Omaha, Nebraska (R 135).

Plaintiff also called one Raymond McElroy, who testified that he has sprinkled salt and sand on ice accumulated on top of freight cars, but his experience is limited to the Baltimore & Ohio shops in South Chicago in 1930 and 1932 and the Chicago & Great Western in Iowa in 1924 or 1925 (R 269, 270). He admitted that the South Chicago area was extremely cold and he has "seen it 20° below" (R 271). His testimony related to areas where they have considerable ice, or as he stated, "Anywhere from 6 feet to a quarter of an inch" (R 272). It is to be noted that witness McElroy's experience went back to 1924, and that in 28 years he only was able to recall two areas where salt and sand were used (R 274). Neither of these instances occurred within the past twenty years and neither referred to a California or western area.

Defendant called Herbert G. Brown, who was a mechanical foreman in Stockton, California, for the Santa Fe railroad. He had been in the employ of said company for 42 years and had served on every point on the line west of La Junta, Colorado. He had never seen sand or salt used on roofs with ice or snow thereon (R 215), and he considered it an unsafe practice because any loose substance on top of a roof is unsafe to men working around or on it. Further, he knows of no instance where the employees' union representatives have ever suggested such a practice (R 215).

Clarence L. Doane was likewise called as a witness by defendant. He is the car foreman for the Western Pacific Company at Stockton yards, and has worked at the Stockton and Oakland yards and also at the yards at Winnemucca, Nevada. He likewise has never seen sand or salt used on the top of cars where there is ice or snow thereon (R 227). He likewise did not consider the use of sand or salt a safe practice because salt or sand would roll under the feet of a man walking on it, and cause a greater hazard unless it is frozen into the ice. Further, when the car moved, such salt and sand would blow off, causing injury to the trainmen on or about such cars (R 227).

Defendant's witness William Duglar testified that to his knowledge the Southern Pacific Company has never used salt or sand (R 196) for the reason that it was not a safe practice, and "we do not have conditions that would require it" (R 196). He testified that it was unsafe because when the car started moving out again, the trainmen have their heads out the windows of the cabs to make inspections, and the sand would fly back and get in their eyes. Further, the use of salt or sand would cause a hazard just the same as icy conditions by rolling under the feet (R 197).

We believe that the mere fact that Wise, through privately conducted "studies," reached the conclusion that salt and sand was a way by which slipping on icy roofs could be prevented does not constitute substantive evidence of negligence sufficient to support the jury verdict. This is particularly so when there was no evidence that such studies were called to the attention of the supervisors of the railroad and the division thereof where the appellant was working. Nor does the testimony as to practices in the sub-

zero weather of the midwest some twenty-five odd years ago constitute any substantive proof of negligence. Further, appellee called the representatives of two of the other major railroads operating in California, and they testified, harmonious with Mr. Dulgar, to the effect that neither of them had ever heard of using sand or salt on roofs of cars to prevent slipping and all deemed it to be an unsafe practice. The fact that the practice is not followed by railroads in northern California seems to be decisive evidence that negligence can not be premised upon failure to follow such proposed practices. This was discussed by the court in *McGivern v. Northern Pac. Ry. Co.*, supra, page 218:

“These instrumentalities were in general use and met with general approval for the performance of this work. *Two other carriers doing switching in Minnesota were shown to follow exactly the same practice.* While custom or usage may not be controlling as fixing the standard of care, it may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee. *The decision of the managing officers of doubtful questions relating to methods of operation or equipment are deemed to be presumptively right and ordinarily they may not be made the foundation of liability to the employee.* (Emphasis supplied)

Appellant's entire argument on this score is based upon the premise that the place from which he fell was a place of work. If it was not a place of work, there was no necessity of providing any ways or means of combating the icy condition. As demonstrated above, the icy metal roof was not a place of work at all. A safe place of work was provided for plaintiff, namely, the two remaining rough boards of the

running board, and plaintiff voluntarily elected to leave this safe place and to abandon this safe method of doing his work, and instead voluntarily selected a dangerous place and performed his work by a dangerous method. Defendant was not bound to anticipate the remote possibility that plaintiff would attempt to repair the running board by standing on the obviously icy metal portion of the roof, and then to make the roof safe by sprinkling salt or sand upon it. (*Brady v. So. R. Co.*, 320 U.S. 476, 483; 88 L. ed. 239, 245.)

VII.

CONCLUSION

It is respectfully submitted that the judgment entered below was correct, in that "it appears conclusively * * * that a reasonably safe place and method of doing the work was afforded and the plaintiff's injuries resulted from his own deliberate or careless act, not from any actionable fault of defendant." The Federal Courts recently have recognized as did the court below, that the social adequacy or inadequacy of the provision of the Federal Employers' Liability Act is a concern of Congress, not the courts. Congress has made negligence of the employer the sole basis for compensation in cases such as this. In the absence of negligence proximately causing the injury there can be no recovery.

It is respectfully submitted that the judgment be affirmed.

HORACE B. WULFF

DEVLIN, DIEPENBROCK & WULFF

Attorneys for Appellee.

(Appendix follows)

No. 12500

United States
Court of Appeals
for the Ninth Circuit.

ALEXANDER & BALDWIN, LIMITED, a Corporation,

Appellant,

vs.

AGNES M. KANNE, Executrix under the Will and
of the Estate of Fred H. Kanne, Collector of
Internal Revenue of the United States for the
District of Hawaii,

Appellee.

Transcript of Record

Appeal from the United States District Court
District of Hawaii.

FILED

MAY 23 1950

PAUL P. O'BRIEN,

No. 12500

United States
Court of Appeals
for the Ninth Circuit.

ALEXANDER & BALDWIN, LIMITED, a Corporation,

Appellant,

vs.

AGNES M. KANNE, Executrix under the Will and
of the Estate of Fred H. Kanne, Collector of
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Transcript of Record

Appeal from the United States District Court
District of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

For the Plaintiff, Alexander & Baldwin, Limited,
PRATT, TAVARES & CASSIDY, By
C. DUDLEY PRATT, ESQ., and
VERNON O. BORTZ, ESQ.,

Alexander & Baldwin Building,
Honolulu, T. H.

For the Defendant, Agnes M. Kanne, etc.,
RAY J. O'BRIEN,

United States Attorney,
District of Hawaii,
Federal Building,
Honolulu, T. H.

In the United States District Court for the
Territory of Hawaii

Civil Action No. 474

ALEXANDER & BALDWIN, LIMITED, a
Hawaiian Corporation,

Plaintiff,

vs.

FRED H. KANNE, Collector of Internal Revenue
of the United States for the District of Hawaii,
Defendant.

COMPLAINT

To the Honorable United States District Court for
the Territory of Hawaii:

Comes now Alexander & Baldwin, Limited, a
Hawaiian corporation, plaintiff, and complaining of
Fred H. Kanne, Collector of Internal Revenue of
the United States for the District of Hawaii, de-
fendant, for cause of action alleges as follows:

I.

That Alexander & Baldwin, Limited, plaintiff
above named, now is and at all times herein men-
tioned was a corporation incorporated under the
laws of the Territory of Hawaii having its princi-
pal office and place of business in Honolulu, City
and County of Honolulu, Territory of Hawaii, and
Fred H. Kanne, defendant above named, is now and
at all times since on or about August 1, 1933, has
been Collector of Internal Revenue of the United

States for the District of Hawaii and is a resident of said Honolulu; that plaintiff claims of defendant the sum of \$7,012.50 with interest thereon from October 6, 1936, and on \$1,476.13 with interest thereon from October 6, 1936, or a total of \$8,488.63 with interest from said date, said sum of \$8,488.63 representing income taxes and interest thereon erroneously and illegally exacted of plaintiff by defendant as hereinafter more fully appears.

II.

That on or about February 21, 1931, plaintiff loaned the sum of \$50,000.00 to Henry Waterhouse Trust Company, Limited, a Hawaiian corporation, and received the note of that corporation in the principal sum of \$50,000.00 as evidence of said debt; that at the time said loan was made plaintiff expected to receive full payment of the same; that in 1932, after full investigation, plaintiff determined that said debt of \$50,000.00 became worthless in 1932 and in said year charged off on its books the sum of \$50,000.00 on account of this indebtedness.

III.

That in the year 1932 the plaintiff contributed the sum of \$1,000.00 to the Hawaiian Bureau of Government Research; that the said contribution was made by the plaintiff with the expectation of deriving a direct financial benefit therefrom; that said sum was an ordinary and necessary expense of doing business.

IV.

That on or before March 15, 1933, plaintiff filed in the Office of the Collector of Internal Revenue of the United States for the District of Hawaii at Honolulu, Territory of Hawaii, its income tax return for the calendar year 1932; that in said return plaintiff deducted the sum of \$50,000.00 on account of said bad debt of Henry Waterhouse Trust Company, Limited, and also deducted the sum of \$1,000.00 as an ordinary and necessary business expense incurred and paid during the calendar year 1932.

V.

That a representative of the Commissioner of Internal Revenue made an examination of said return and proposed the disallowance of certain deductions, including the above-mentioned deductions claimed by the plaintiff and asserted that an additional income tax was due from plaintiff, to which proposed disallowance of deductions plaintiff protested within the time and in the manner as prescribed by law and the regulations.

VI.

That thereafter the Commissioner of Internal Revenue reviewed the matter and tentatively determined that plaintiff was subject to an additional income tax for the calendar year 1932; that plaintiff protested the grounds and conclusions of the Commissioner in that behalf within the time and in the manner as prescribed by law and the regulations.

VII.

That thereafter, by letter dated June 2, 1936, symbols:

IT:AR:E-7-8 GVR-90D addressed to plaintiff, the Commissioner of Internal Revenue stated that the determination of the income tax liability of plaintiff for the calendar year 1932 disclosed a deficiency of \$8,853.06; that in and by said letter said Commissioner disallowed as a deduction said bad debt deduction in the sum of \$50,000.00 and also disallowed as a deduction as an ordinary business expense the sum of \$1,000.00.

VIII.

That thereafter the amount of \$8,853.06 as and for the income tax for the calendar year 1932 was assessed against plaintiff and defendant above named demanded that plaintiff pay the same together with an additional amount of \$1,863.56 as interest thereon; that said tax and interest totaling \$10,716.57 was paid by plaintiff to defendant on October 6, 1936.

IX.

That of the tax so paid the sum of \$6,875.00 resulted from the disallowance as a deduction from its gross income as a bad debt of the said sum of \$50,000.00, and the sum of \$137.50 in taxes so paid resulted from the disallowance from its gross income of the sum of \$1,000.00 contributed by the plaintiff to the Hawaiian Bureau of Government Research.

X.

That on or about November 27, 1936, plaintiff filed with the Commissioner of Internal Revenue through the Collector of Internal Revenue, his agent for that purpose, a claim for refund covering the calendar year 1932 on Form 843 as prescribed by the Commissioner of Internal Revenue for the refund of said \$10,716.57, which claim, insofar as it pertained to said bad debt deduction of \$50,000.00 and the deduction of \$1,000.00 contributed to the Hawaiian Bureau of Government Research, was rejected by the Commissioner on November 14, 1940.

XI.

That no amount has been paid to said plaintiff of said two sums totaling \$8,488.63 claimed as taxes and interest thereon and so illegally assessed, demanded and collected by said defendant from said plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of \$8,488.63, with interest thereon from October 6, 1936.

Dated: Honolulu, T. H., this 21 day of July, 1942.

ALEXANDER & BALDWIN,
LIMITED,
Plaintiff.

By /s/ J. P. COOKE,
Its Vice-President.

Territory of Hawaii,
City and County of Honolulu—ss.

J. P. Cooke, being first duly sworn on oath deposes and says: That he is Vice-President of Alexander & Baldwin, Limited, and is authorized to make this verification for and on behalf of said Alexander & Baldwin, Limited; that he has read the foregoing Complaint, know the contents thereof and that the same is true.

/s/ J. P. COOKE.

Subscribed and sworn to before me this 21 day of July, 1942.

[Seal] /s/ MILDRED J. AULT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires June 30, 1945.

[Endorsed]: Filed July 21, 1942.

[Title of District Court and Cause.]

ANSWER

The defendant in the above-entitled action, by his attorney, Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, for his answer to the complaint herein:

I.

Admits each and every allegation in the paragraphs of the complaint marked and numbered IV, V, VI, VII, VIII, IX and X.

II.

Denies that the sum of \$8,488.63, or any other sum was erroneously and illegally exacted of plaintiff by defendant and admits each and every other allegation contained in paragraph marked and numbered I of the complaint.

III.

Admits that on or about February 21, 1931, plaintiff paid the sum of \$50,000 to Henry Waterhouse Trust Company, Limited, a Hawaiian corporation, and received the note of that corporation in the principal sum of \$50,000, but denies on information and belief each and every other allegation contained in paragraph marked and numbered II of the complaint.

IV.

Admits that in the year 1932, plaintiff contributed the sum of \$1,000 to the Hawaiian Bureau of Government Research, but denies each and every other allegation contained in paragraph marked and numbered III of the complaint.

V.

Admits that no sum has been paid plaintiff on account of plaintiff's claim for refund of income taxes paid by plaintiff for the calendar year 1932, but denies each and every other allegation contained in paragraph marked and numbered XI of the complaint.

Wherefore, defendant demands judgment against

the plaintiff dismissing the complaint herein, together with the costs and disbursements of this action.

Dated at Honolulu, T. H., this 17 day of October, 1942.

/s/ ANGUS M. TAYLOR, JR.

United States Attorney,
District of Hawaii.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 17, 1942.

[Title of District Court and Cause.]

MOTION TO AMEND COMPLAINT

Comes now Alexander & Baldwin, Limited, Plaintiff above named, by its attorneys Stanley, Vitousek, Pratt & Winn, and moves to amend the Complaint on file in the above-entitled cause and matter by adding at the end of Paragraph II of said Complaint the following language, to wit:

“That said sum was allowable as a deduction under the provision of Section 23(j) of the Revenue Act of 1932, or under the provision of Section 23(a) of said Act and Article 262 of Regulations 77,” so that Paragraph II as amended will read as follows:

“That on or about February 21, 1931, plaintiff loaned the sum of \$50,000.00 to Henry Waterhouse Trust Company, Limited, a Hawaiian corporation,

and received the note of that corporation in the principal sum of \$50,000.00 as evidence of said debt; that at the time said loan was made plaintiff expected to receive full payment of the same; that in 1932, after full investigation, plaintiff determined that said debt of \$50,000.00 became worthless in 1932 and in said year charged off on its books the sum of \$50,000.00 on account of this indebtedness; that said sum was allowable as a deduction under the provisions of Section 23(j) of the Revenue Act of 1932, or under the provisions of Section 23(a) of said Act and Article 262 of Regulations 77." This motion is based upon the record and files herein.

Dated: Honolulu, T. H., October 28, 1943.

ALEXANDER & BALDWIN,
LIMITED,
Plaintiff.

STANLEY, VITOUSEK,
PRATT & WINN,
Its Attorneys.

By /s/ MONTGOMERY E. WINN.

NOTICE OF HEARING ON MOTION

To: G. D. Crozier, United States Attorney, District of Hawaii:

Please take notice that within Motion will be heard at the hour of 10 o'clock a.m. on Tuesday, the 2nd day of November, 1943, before the Honorable Delbert E. Metzger in his Courtroom, Federal

Building, Honolulu, T. H., or as soon thereafter as the matter can be heard.

STANLEY, VITOUSEK,
PRATT & WINN,
Attorneys for Plaintiff.
By /s/ MONTGOMERY E. WINN.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 28, 1943.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO AMEND
COMPLAINT

The motion to amend the Complaint filed by the plaintiff herein on October 28, 1943, is hereby allowed and the defendant is granted up to and including November 12, 1943, to plead to the Complaint as amended.

Dated: Honolulu, T. H., this 3rd day of November, 1943.

/s/ D. E. METZGER,
Judge of the Above-Entitled
Court.

[Endorsed]: Filed Nov. 3, 1943. .

[Title of District Court and Cause.]

MOTION TO SUBSTITUTE EXECUTRIX AS
DEFENDANT WITH CONSENT OF EXE-
CUTRIX

In the above-entitled cause, Plaintiff shows that Fred H. Kanne, the above-named defendant died on December 24, 1946, and that the estate of said defendant has passed into the control of Agnes M. Kanne, as Executrix under the Will of said Fred H. Kanne, Deceased, said Agnes M. Kanne having qualified and been confirmed as such Executrix on February 4, 1947, as shown by the records of the Probate Court for the City and County of Honolulu, Territory of Hawaii.

Wherefore, Plaintiff moves for an order substituting as Party Defendant herein Agnes M. Kanne, Executrix as aforesaid, and that otherwise the record in the case may stand as now made and the case proceed on the pleadings and records heretofore filed in said cause.

Dated: Honolulu, T. H., this 26th day of June, 1947.

VITOUSEK, PRATT & WINN,
Attorneys for Plaintiff.

It is agreed on behalf of the Estate of Fred H. Kanne, Deceased, that the above Motion may be granted and the substitution made as therein requested.

Dated: Honolulu, T. H., this 7th day of July, 1947.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ EDWARD A TOWSE,
Attorney for Agnes M. Kanne, Executrix Under the
Will and of the Estate of Fred H. Kanne, De-
ceased.

Allowed: July 7, 1947.

/s/ J. FRANK M. McLAUGHLIN,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed July 7, 1947.

In the United States District Court
For the Territory of Hawaii

Civil No. 419

AMERICAN FACTORS, LIMITED, an Hawaiian
Corporation,

Plaintiff,

vs.

AGNES M. KANNE, Executrix Under the Will of
FRED H. KANNE, Deceased,

Defendant.

Civil No. 474

ALEXANDER & BALDWIN, LIMITED, an Ha-
waiian Corporation,

Plaintiff,

vs.

AGNES M. KANNE, Executrix Under the Will of
FRED H. KANNE, Deceased,

Defendant.

OPINION

These two cases for the recovery of income taxes paid to the United States Internal Revenue Collector, were both tried in the same hearing.

The claim of American Factors, Limited was for recovery of taxes paid on sums deducted as exemptions from its 1932 gross income tax return, which exemptions were denied by the Collector, as follows:

(1) In 1924 the corporation, together with 23 of its stockholders, was sued by J. C. Isenberg, et al., for \$10,000,000 damages, alleging fraud in connection with the transfer of the property of Hackfeld & Company, Limited, by the Alien Property Custodian to the taxpayer, a newly-formed corporation.

Twenty-two of the stockholders who were jointly sued with the taxpayer entered into an agreement among themselves to pay pro rata, on the basis of the stock for which they severally originally subscribed, the litigation costs of this suit. The taxpayer advanced from time to time such costs and expenses as they accrued and rendered accounts to this group of defendant stockholders. This litigation ran for several years and its total cost was \$568,607.76. Of this sum, the twenty-two contributing stockholding defendants paid in to the company the sum of \$396,812.50. There were 615 other original stockholders who were not made defendants who paid nothing into the litigation fund.

When the litigation came to an end in 1932 the taxpayer, being authorized at a meeting of its stockholders, refunded to the twenty-two stockholding defendants the sums they had contributed and deducted the same from its gross income tax return as an item of litigation expense, claiming it was legally liable to these contributors notwithstanding that they had made no claim or demand. This exemption claim is disallowed.

(2) In 1931 this taxpayer advanced the sum of

\$50,000 to H. Waterhouse Trust Company, Ltd., in the hope of aiding, with the help of others, the trust company from closing its doors due to its insolvent condition, which insolvency was known to the taxpayer. The following year the loan was written off the taxpayer's books as a total loss and deducted as a bad debt in its gross income tax return for that year. It claimed that the loan, while somewhat speculative, was made in good faith and supported by a promissory note. The note contained a proviso, as follows:

“Payment of principal and interest to be made only when, if and to the extent that there shall be funds available therefor as set forth in letter of this date from the payor to the payee.”

This deduction claim is disallowed.

(3) In its tax return for 1932 the taxpayer deducted as an ordinary and business expense the sum of \$4,063.33 paid by it as pensions to widows and children of deceased employees. The collector denied this deduction; the Court finds it justifiable and allowed it.

Alexander & Baldwin, Limited's Case.

The claim of Alexander & Baldwin, Limited, was for “bad debt” deduction which had been disallowed, and for a contribution which was also disallowed by the Collector.

In 1931 this taxpayer loaned \$50,000 to Henry Waterhouse Trust Company, Limited, for the pur-

poses of reorganization, for which it received a note in the same terms as that received by American Factors. The following year this taxpayer determined the debt to be worthless and wrote it off in its books as a loss, which loss it claimed in its following tax return. This claim was on the same basis as the American Factors' claim and was disallowed by the Court.

In 1932 this taxpayer contributed \$1,000 to the Hawaiian Bureau of Government Research, an organization maintained by contributions, which was created to gather statistical information and report on public affairs, legislation, social and economic which affected or might affect taxpayers, which contribution was disallowed by the collector.

At the close of arguments November 15, 1947, in the trial of the two cases the Court announced from the bench the following decisions:

“American Factors, Limited.

1. Hackfeld Litigation:

“My opinion is that the persons who subscribed to pay voluntarily for the defense of this inordinately costly litigation were impulsed and motivated entirely by keen personal interests and desires to defeat the demands of the plaintiffs in the case and clear themselves as defendants against claims that they had unlawfully conspired and acted in fraud and greed, as well as to escape a liability in damages by a possible judgment against them, and to protect their individual investments as shareholders

in the corporation, and that they were willing, and made a definite offer to pay, and did pay, to the extent of assessments made against them, without promise or original expectation of reimbursement at the time and times they made their contributions to the litigation fund.

“There is no evidence that the taxpayer promised or implied an intention to reimburse them at the time they subscribed the agreement or made their contributions, and no evidence that the taxpayer even considered the matter until the backbone of the litigation was broken in victory to all the defendants.

“There was no demand by them or test of their right to have contribution at the expense of other shareholders who were not named as parties defendant. The approval at a stockholders’ meeting and the act of the management in reimbursing these contributors from the company’s funds apparently flowed largely from feelings of gratitude arising from the successful outcome of the case in litigation and the liberal aid of the contributors and their steering committee which contributed many facilities and influences such as could not have been supplied by the management of American Factors acting alone.

“Certainly, the taxpayer had very substantial interests to protect, and was justified in every way, as a legitimate business outlay, in paying from its own funds during the taxable year of 1932, or earlier years had it chosen to do so, the costs of

litigation which imperiled its existence although others were involved in the same litigation as defendants and had much to lose, had the others not come forward with funds and volunteered to engineer and fight the battle at their own costs and had the taxpayer not accepted this offered payment plan and the volunteered services; either of the parties could have abandoned or modified this plan at any time, but so long as it was adhered to it was binding on both; but the taxpayer was not justified, in the realm of taxation laws and deductibles, to later deduct from taxable income the money it paid to reimburse voluntary contributors for money which they had paid out to clear themselves and this company of fraudulent charges made against them collectively and individually and to protect their property interests, no matter if victory in such defense brought great benefit to the taxpayer as well as to the other named defendants.

“As between share owners, of course, within ultra vires limitations, they were empowered to make any desired distribution of the company's funds so long as none was injured.

“The taxpayer is entitled to an expense-deduction in its 1932 tax return of the sum of all Hackfeld litigation paid by it prior to the end of 1932, less the amount paid in to it for that purpose by the other defendants. The claim for tax refund on sums reimbursed to voluntary contributors to this litigation fund is denied.

2. "As to the Waterhouse Trust Company contribution of \$50,000, this was just that—a contribution. The note given in acknowledgment of the contribution was contingent as to value upon such conditions as to give it no negotiable value from the time it was made. It could not be dealt with as a debt. The considerations in payment for the contribution flowed to the payee of the note at the time it was made—the protection of the commercial community, sympathy toward Waterhouse Company clients who could ill afford to lose, and other commendable desires and motives of helpfulness and security, but there was no attempt to show that either American Factors or Alexander & Baldwin would have suffered any material loss had they not attempted to keep the Waterhouse Trust Company a going concern.

"I find that no part of this contribution was deductible as a bad debt or loss in 1932 or at any other time, since it never was a collectible debt, but was from the beginning in the nature of a contingent or speculative gift, to which status it speedily resolved itself with certainty, although it may have accomplished in part the purpose for which it was intended, that is, prolonged the life of Waterhouse Trust Company. Claim for tax refund on this outgoing sum of \$50,000 is denied.

3. "As to the items of contributions or pensions to dependents of deceased employees, I am fully convinced from the evidence that this was a usual and, within ordinary business discretion, a neces-

sary and proper business practice. It is well recognized that it would reasonably tend to the gratification, good will and loyalty of employees in general and thus be a benefit to business operations, particularly in a business under many department heads and of ramified operations.

“I find these moderate and reasonable items to be proper income tax deductions.

“Alexander & Baldwin, Limited.

1. “My opinion and finding with respect to the Waterhouse Trust contribution in the American Factors case is, in all pertinent respects, applicable to the refund claim of this litigant and the said claim is denied.

2. “As to the contribution to maintain the Hawaiian Bureau of Government Research, I find this to be an ordinary and necessary expense to a firm carrying on the business and business trusts and responsibilities such as Alexander & Baldwin carry.

“If more extensive findings and conclusions are desired, the prevailing parties may prepare and submit such proposals to me, after tendering copies to opposing counsel.”

/s/ DELBERT E. METZGER,

Judge.

[Endorsed]: Filed Nov. 18, 1948.

In the United States District Court
For the Territory of Hawaii

Civil No. 474

ALEXANDER & BALDWIN, LIMITED, an Hawaiian Corporation,

Plaintiff,

vs.

AGNES M. KANNE, Executrix Under the Will
and of the Estate of Fred H. Kanne, Collector
of Internal Revenue of the United States for
the District of Hawaii,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Upon the record, testimony and evidence adduced in this case, the Court makes the following findings of fact:

I.

That Alexander & Baldwin, Limited, the Plaintiff herein, is a corporation, incorporated under the laws of the Territory of Hawaii, having its principal office in Honolulu, City and County of Honolulu, Territory of Hawaii.

II.

That Fred H. Kanne was Collector of Internal Revenue of the United States of America for the District of Hawaii and a resident of Honolulu at

all times from on or about August 1, 1933, until his death on December 24, 1946; that Agnes M. Kanne, the duly qualified and appointed Executrix of the Will and of the Estate of Fred H. Kanne, deceased, was substituted as defendant in this cause by order of this Court on March 6, 1947.

III.

That Henry Waterhouse Trust Company, Limited, was incorporated under the laws of the Territory of Hawaii on November 26, 1902, to engage in the business usual and permitted to a trust company under the laws of the Territory. In addition to engaging in the usual fiduciary business common to all trust companies it operated a plantation agency department, a real estate department, a stock and bond brokerage department, and an insurance department, and at times invested in stocks and bonds to a limited extent on its own account, these various activities being permissible under the Hawaiian statutes and its Articles of Incorporation.

IV.

That in the middle of October, 1930, the Henry Waterhouse Trust Company increased its capital stock from \$200,000.00 to \$400,000.00, consisting of four thousand shares of a par value of \$100.00 each. The new shares were all taken by the old stockholders who paid for them in cash at par. In November of that year, the effects of the general business depression began to be felt in the Territory of Hawaii, and as a large part of the Waterhouse

Company assets consisted of real estate and mortgages, its secretary became apprehensive that if many calls were made on its demand accounts the company's financial condition would not be sufficiently liquid to meet its cash requirements. He discussed the situation with the treasurer and auditor of the Company and informed the management of Bishop Trust Company, Limited, that a sale of the Waterhouse stock might be arranged, suggesting a price of \$100.00 each or more for the shares, the Bishop Trust Company taking the suggestion under consideration pending an examination of the affairs of the Waterhouse Company.

V.

In 1931 the Waterhouse Company was conducting business as usual but was encountering some financial difficulties; economic conditions were not clear, and, after an investigation, the executives of the Bishop Trust Company, Limited, advised the Waterhouse Company shareholders that it would not pay cash for their shares as had been previously suggested. Mr. A. W. T. Bottomley, President of American Factors, Limited, and of the Bishop First National Bank of Honolulu, and vice-president of the Bishop Trust Company, Limited, called a conference of the heads of the principal Hawaiian sugar agencies, the president of the Bank of Hawaii, Limited, the president of the Hawaiian Trust Company, Limited, and two members of the finance committee of the Bishop Trust Company, Limited, to present to them the financial condition of the

Waterhouse Company and discuss the feasibility of making some plan to prevent the Waterhouse Company from being forced into liquidation.

VI.

That on Saturday, February 14, 1931, Mr. W. F. Frear, President of the Bishop Trust Company, Limited, at a meeting of the Board of Directors of that company, made a statement which was recorded on the minutes as follows:

“This is a special meeting called to consider a proposition to take over the Henry Waterhouse Trust Co., Ltd. At first it was a proposition to purchase the stock of that company, somewhat as we purchased the stock of the Pacific Trust Co., but as a result of investigation, it changed largely to a salvage proposition.

“The plan now is for our Company to acquire all the stock of the Waterhouse Trust Co. without cost; for Mr. and Mrs. R. W. Shingle and Mr. A. N. Campbell, in settlement of their indebtedness to the Company, to pay into it \$535,000.00 and to convey to its order their respective 18% and 10% undivided interests in certain land, fish ponds and fishery at Kalihi, the same to be sold for \$87,000.00 and the proceeds, with \$13,000 additional contributed by the Bishop Trust Co., to make up an even \$100,000.00, to be paid into the Waterhouse Trust Co., making in all \$635,000.00 thus paid in. In addition, a number of corporations and individuals are to contribute various sums aggregating \$400,000.00, thus making altogether \$1,035,000.00 of cash to be paid into the

Waterhouse Trust Co. The Bishop Trust Co. is to pay such amount, if any, as may be required in addition to enable the Waterhouse Trust Company to meet its liabilities, but it is hoped that no such contribution will be required. That, however, remains to be seen.

“The Bishop Trust Co. is to take over, without other cost, the business of the Waterhouse Trust Co., other than the assets and liabilities, and to operate such business at its own expense and for its own benefit. This will include the trusts, executorships, agencies, insurance, safe deposit business, etc., with the necessary furniture, equipment and supplies therefor. It is hoped also that the Bishop Trust Co. will profit through making new contacts. The stock and bond and real estate departments will probably be discontinued.

“The assets and liabilities of the Waterhouse Trust Co. are to be gradually liquidated by applying the assets to the liabilities, together with the expenses of liquidation, including \$1,000.00 a month to be paid to the Bishop Trust Co. for supervision.

“In final settlement, if there is an excess of assets over liabilities, it is to be applied, first, to the reimbursement of the amount, if any, that may be contributed by the Bishop Trust Co. in addition to the \$1,035,000.00, and, secondly, pro rata to the contributors of the \$400,000.00 with simple interest at 4%, and, thirdly, the balance, if any, to go to the Bishop Trust Co.

“There are three objects: First, to prevent the

failure of such a company as the Waterhouse Trust Co., with the consequent general disastrous effects; secondly, to prevent loss on the part of many who have entrusted their money to the Company for investment and who can ill afford the loss; and, thirdly, to enable the Bishop Trust Co. to acquire new business. These three objects naturally appeal with different degrees of force to different groups of contributors."

The plan, as outlined above, was approved by the Board of Directors of the Bishop Trust Company, Limited, at that meeting; and the transactions mentioned in the second paragraph of Mr. Frear's statement were duly performed within a few days after February 14, 1931.

VII.

Prior to the consummation of the transactions hereinbefore mentioned, the following individuals and corporations promised to pay to the Waterhouse Company, upon consummation of the proposed plan, the sums of money set opposite their names, to wit:

Name of Contributor	Amount Paid
The Bishop Company, Limited.....	\$100,000
American Factors, Limited.....	50,000
Alexander & Baldwin, Limited.....	50,000
Castle & Cooke, Limited.....	50,000
W. R. Castle.....	50,000
Beatrice Castle Newcomb.....	50,000
Bank of Hawaii.....	25,000
Hawaiian Trust Company, Limited.....	25,000
Total.....	<hr/> \$400,000

VIII.

At a meeting of the Board of Directors of Alexander & Baldwin, Limited, held on February 25, 1931, payment of \$50,000.00 to the Waterhouse Company pursuant to the aforesaid plan was duly authorized.

IX.

That the plan of reorganization of the Waterhouse Company was carried out as outlined above and plaintiff and the individuals and other corporations whose names appear above in the preceding paragraph, number VII of these findings, actually paid into the Waterhouse Company the amounts of money stated opposite their respective names, upon the provisions concerning the repayment thereof as are more particularly stated in the letters from the Henry Waterhouse Trust Company to plaintiff dated February 21, 1931, and February 24, 1931, which read respectively as follows:

“Honolulu, Hawaii,
February 21, 1931.

Alexander & Baldwin, Ltd.
Honolulu, T. H.

Gentlemen:

We outline as follows the plan in regard to the Henry Waterhouse Trust Company, Limited.

1. The Bishop Trust Co., Ltd., has acquired all of the capital stock of the Henry Waterhouse Trust Co., Ltd.

2. In settlement of their indebtedness to the Henry Waterhouse Trust Co., Ltd., R. W. Shingle and wife have paid into that Company \$435,000.00; A. N. Campbell has paid into it \$100,000.00; and R. W. Shingle and A. N. Campbell are to convey to the company or to its order their respective 18% and 10% undivided interests in certain land, fish ponds and fishery at and near Mokauea, Kalihikai, Honolulu, the same to be sold and the proceeds thereof, plus such additional sum (to be contributed by Bishop Trust Co., Ltd.) as shall be necessary to make a total of \$100,000.00, to be paid to the Henry Waterhouse Trust Co., Ltd.

3. The following corporations and individuals have contributed or are to contribute the following sums to the Henry Waterhouse Trust Co., Ltd.: The Bishop Co., Ltd., \$100,000.00; American Factors, Ltd., Alexander & Baldwin, Ltd., Castle & Cooke, Ltd., W. R. Castle and Beatrice Castle Newcomb each \$50,000.00; and the Bank of Hawaii, Ltd., and the Hawaiian Trust Co., Ltd., each \$25,000.00. For the amounts of these contributions notes of the Henry Waterhouse Trust Co., Ltd., of even date herewith, bearing simple interest at the rate of four per cent (4%) per annum, have been or will be given to the respective contributors, payable, however, only as provided in paragraph 8.

4. The Bishop Trust Co., Ltd., will ultimately contribute such amount, if any, over the above sums aggregating \$1,035,000.00, as may be required to liquidate the liabilities (other than the sums of notes

mentioned in paragraph 3) of the Henry Waterhouse Trust Co., Ltd.

5. The Bishop Trust Co., Ltd., will take over, own and operate at its own expense and for its own benefit, in its own name or in the name of the Henry Waterhouse Trust Co., Ltd., the business (with such of the furniture, equipment and supplies as shall be required therefor) other than the assets subject to the liabilities (referred to in paragraph 6) of the Henry Waterhouse Trust Co., Ltd. Any of the business so taken over by the Bishop Trust Co., Ltd., may by it be discontinued, sold or merged with its other business.

6. The assets and liabilities of the Henry Waterhouse Trust Co., Ltd., will gradually be liquidated by applying the assets or their proceeds and the income therefrom to (a) the expenses involved in such liquidation (such as salaries, taxes, rent, insurance, legal, auditing, bank examiner, postage, cables, books, stationery, etc.); (b) \$1,000.00 per month to the Bishop Trust Co., Ltd., for overhead or supervision; (c) interest payable; (d) indebtedness; and (e) other liabilities, if any. The assets shall be deemed to include cash on hand, bank deposits, notes and accounts receivable, stocks and bonds, stock exchange seat, and furniture, equipment and supplies (except as otherwise provided in paragraph 5) owned by the Henry Waterhouse Trust Co., Ltd., at the close of business on February 14, 1931, and the sums since paid or to be paid in as set forth in paragraphs 2,

3, and 4; the liabilities shall be deemed to include all liabilities of the company as of that date, and liabilities subsequently incurred in connection with the liquidation; the expenses of operation shall be deemed to include, besides other items, the cost of investigation by accountants preliminary to the reorganization, the cost of an audit of the Company's affairs and of the set-up of the accounting system at the outset by accountants, a proper pro rata of salaries of officers and employees of the Bishop Trust Co., Ltd., transferred temporarily for the reorganization, rehabilitation and readjustment of the affairs of the Henry Waterhouse Trust Co., Ltd., at the outset and a proper pro rata of the salaries of officers and employees of the Henry Waterhouse Trust Co., Ltd., so long as their services are rendered in part in connection with the liquidation and in part in connection with the business taken over by the Bishop Trust Co., Ltd. It is proposed for convenience, efficiency and economy, to transfer the various branches of the business to the Bishop Trust Building as soon as the circumstances warrant.

7. In final settlement, the excess, if any, of the assets as defined in paragraph 6 or their proceeds and the income therefrom over the payments specified in paragraph 6 is to be applied, so far as it will go, in the following order of priority: First, to reimbursing the Bishop Trust Co., Ltd., for such amount, if any, without interest as may be contributed by it under paragraph 4 above; secondly, to paying pro rata, principal and interest, the notes

mentioned in paragraph 3, and thirdly, the balance, if any, of such excess to be paid to the Bishop Trust Co., Ltd.

8. The Henry Waterhouse Trust Co., Ltd., may from time to time borrow money (from the Bishop Trust Co., Ltd., and/or others) to meet its requirements in connection with the liquidation and repay the same with interest. The notes (principal and interest) mentioned in paragraph 3 shall be payable only if and to the extent that there shall be an excess of assets available therefor in final settlement after the payments specified in paragraph 6 and the reimbursement of the Bishop Trust Co., Ltd., provided for in subdivision First of paragraph 7. The books of the Henry Waterhouse Trust Co., Ltd., shall be closed at the end of each calendar half year and a financial statement for such half year shall thereupon be furnished to each of the contributors named in paragraph 3. Such contributors shall have the right to inspect the books of the Company at all reasonable times.

Very truly yours,

HENRY WATERHOUSE
TRUST COMPANY,
LIMITED,

By W. F. FREAR,

Its President,

By W. A. WHITE,

Its Treasurer."

“Honolulu, Hawaii,
February 24, 1931.

Alexander & Baldwin, Ltd.
Honolulu, T. H.

Gentlemen:

Supplementing our letter of the 21st instant in regard to the Henry Waterhouse Trust Co., Ltd.:

1. There is a Finance Committee, consisting at present of M. B. Henshaw, J. L. Cockburn and E. W. Sutton, for frequent consultation on numerous matters, including many that naturally it would be impracticable to bring before the Advisory Committee referred to in the next paragraph.

2. There will be an Advisory Committee for passing upon various matters of importance, particularly those tending to affect the amount of reimbursement, if any, ultimately to be made to the contributors mentioned in paragraph 3 of the letter above referred to—such matters as sales of stocks and bonds owned by the Company, compromises of claims by or against the Company, etc. This Committee will consist for the present of A. W. T. Bottomley, C. H. Cooke and A. L. Castle, with alternates as follows to act in their several respective places when they cannot act: H. A. Walker and S. M. Lowrey, alternates to A. W. T. Bottomley; R. McCorriston and E. W. Carden, alternates to

C. H. Cooke; F. C. Atherton and A. G. Budge,
alternates to A. L. Castle.

Very truly yours,
HENRY WATERHOUSE
TRUST COMPANY,
LIMITED,
By W. F. FREAR,
Its President,
By W. A. WHITE,
Its Treasurer."

Plaintiff received from the Waterhouse Company
the following note, being the note referred to in
the aforesaid letter dated February 21, 1931:

"(\$50,000.00)

February 21, 1931.

For value received, the Henry Waterhouse Trust
Company, Limited, promises to pay to Alexander &
Baldwin, Limited, Fifty Thousand Dollars (\$50,-
000.00), with interest thereon from date at the rate
of four per cent (4%) per annum, payment of
principal and interest to be made only when, if and
to the extent that there shall be funds available
therefor as set forth in letter of this date from the
payor to the payee.

HENRY WATERHOUSE
TRUST COMPANY,
LIMITED,
By W. F. FREAR,
Its President,
By W. A. WHITE,
Its Treasurer."

Plaintiff was not a stockholder of the Waterhouse Company.

X.

That as of February 14, 1931, the \$400,000.00 par value of capital stock of the Waterhouse Company was transferred to the Bishop Trust Company, Limited, without any cash payment therefor, and the cash balances, properties, stocks and bonds, accounts, books and records of the Waterhouse Company came under the management and control of the Bishop Trust Company, Limited, as sole stockholder. New officers and directors were elected, a finance committee, comprised of officers and directors, and an advisory committee comprised of representatives of the \$400,000.00 noteholders, were appointed, and work was immediately commenced on the liquidation of the Waterhouse Company.

XI.

That an audit report dated March 31, 1931, of Tennent & Company, certified public accountants of Honolulu, T. H., disclosed the book value of assets of the Waterhouse Company, as of February 14, 1931, to be in the amount of \$4,820,090.92, and the liabilities, exclusive of capital and surplus, to be in the amount of \$4,149,437.06. It was stated in the audit report that the principal purpose of the audit was to establish as accurately as possible the total assets and liabilities as of February 14, 1931, the date control of the company passed to the Bishop Trust Company, and the audit report contained the following statement:

“The Contingent Reserve (for losses) of \$680,-803.15 and the Special Contingent Reserve of \$400,-000.00 referred to above, are considered adequate to cover probable losses in the realization of the assets and liquidation of liabilities.”

The audit report also contained a statement expressing that the Special Contingent Reserve for Losses will remain intact until actual losses written off have fully exhausted that reserve and that additional losses as determined will then be applied pro rata against the Special Contingent Reserve contributions, to wit, the \$400,000.00, representing the amounts paid in by the special noteholders.

In further explanation of Exhibit “A” referred to in paragraph V of stipulation I, particularly with respect to the item of estimated losses amounting to \$1,080,803.15 shown thereon, the auditor who prepared the audit report containing Exhibit “A” hereinbefore described testified as follows:

“A Exhibit ‘A,’ as I see it here, looks to me like it is an exact copy of what was Exhibit ‘A’ in my report, as Government counsel said, so that the figures are identically the same. Now, then, that million and eighty thousand dollars, as it is shown there, is somewhat of a balance figure to make up the million eight hundred fourteen thousand dollars which is the difference of it, or the million and eighty is the difference between the million and eight hundred fourteen thousand and the \$733,-000 representing the Shingle and Campbell account.

Now, then, the \$1,814,000, according to my work papers, is made up first of the \$1,548,000 about which I just testified, plus approximately \$260,000 more that was added in there to make these figures balance out for two reasons: One being that between the January 31st scheduled preparation and the February 14, 1931, Shingle and Campbell had paid in the \$635,000 for one thing; also in making up the balance sheet of February 14, we had to take into account that there was an operating—that the company was operating and had gone on from January 1st to February 14th, and during that period the books reflected a loss of \$10,149. Now, then, going back to the million and eighty thousand dollars, that is the figure which when the \$400,000 paid in by the noteholders—after that would be paid in and added to the \$680,000 that shows as the net worth on the balance sheet, would make up the million eighty thousand dollars.

* * *

“Q. Mr. Greaney, you mentioned a figure of \$260,000 being added to the estimated losses. Will you explain what that 260,000 odd represented?

“A. The \$260,000 represented a cushion in effect and had the effect of being a cushion to take care of any losses over and above the amount that was put in the loss column on the schedule that was prepared, covering the individual receivables that were on the books.

“Q. And that was done for what purpose?

“A. That was done because by the time we got around to preparing the final report and putting the

figures together, the Bishop Trust Company had agreed to take over the operation of the Waterhouse Trust Company and had changed its position somewhat from a position it had taken somewhat shortly prior to that time, that they would pay something for the stock. And as it finally turned out they refused to pay anything for the stock so that the reserve for contingencies was made to balance up so that it would appear proper to pay nothing for the stock."

XII.

That the balance sheets of the Henry Waterhouse Trust Company as at February 14, 1931, after the aforesaid reorganization; and at December 31, 1931, and at December 31, 1932, were as follows:

Henry Waterhouse Trust Company Balance Sheets

Assets:	As at Feb. 14, 1931	As at Dec. 31, 1931	As at Dec. 31, 1932
	After Reorganization		
Cash	\$1,044,547.87	\$ 29,700.69	\$ 14,639.50
Investments	605,181.47	-----	-----
Receivables	77,184.34	-----	15,214.69
Trust and agency accounts (Shingle & Campbell).....	-----	-----	-----
Other trust & agency accts.	1,439,567.36	383,460.67	299,565.32
Loans	1,978,492.73	2,247,844.14	1,624,740.12
Other Assets	75,117.15	17,434.16	17,326.66
Stocks and bonds.....	-----	251,220.65	267,122.42
Stocks in subsidiaries	-----	303,704.16	303,704.16
Advances to subsidiaries	-----	324,382.60	314,787.92
Real estate for sale.....	-----	169,700.00	233,273.02
Expense in suspense.....	-----	-----	17,500.00
Profit and loss—Special.....	400,000.00	400,000.00	400,000.00
	<u>\$5,620,090.92</u>	<u>\$4,127,447.07</u>	<u>\$3,507,873.81</u>
Liabilities:			
Overdrafts balances due			
Brokers, etc.	\$ 457,545.90	\$ 79,578.59	\$ 46,648.10
Notes payable	223,100.00	376,557.98	674,190.88
Trust & Agency accounts....	2,978,515.16	1,834,540.86	1,068,907.28
Loans pledged to clients.....	490,276.00	198,000.00	132,128.00
Merchandise accounts	-----	1,252.11	-----
Notes payable—affiliated Co.	-----	550,000.00	602,500.00
Income in suspense.....	-----	-----	2,417.13
P. & L. Acct.—operating deficit 2/14/31.....	(10,149.29)	(10,149.29)	(10,149.29)
P. & L. Acct.— operating deficit subsequent to 2/14/31.....	-----	(58,526.56)	(80,062.56)
Surplus & surplus reserves..	-----	-----	-----
Reserve for losses.....	680,803.15	356,193.38	271,294.27
Contingent reserve— underwriters	400,000.00	400,000.00	400,000.00
Capital stock	400,000.00	400,000.00	400,000.00
	<u>\$5,620,090.92</u>	<u>\$4,127,447.07</u>	<u>\$3,507,873.81</u>

At December 31, 1931, Henry Waterhouse Trust Company had sustained on liquidation actual losses amounting to \$324,913.77, and at December 31, 1932, it had sustained on liquidation cumulative actual losses totaling \$410,345.80, so that at the end of 1932 there was still a balance of \$190,457.35 remaining in the Reserve for Losses, against which future losses must be paid before there would be any impairment for the repayment of the \$400,000.00 contributions to the special noteholders.

XIII.

The note given by the Henry Waterhouse Trust Company to Alexander & Baldwin, Limited, in acknowledgement of the contribution of \$50,000 made by that company in 1931 to the Henry Waterhouse Trust Company was contingent as to payment, being subject to such conditions as to render it non-negotiable at the time it was made and at all times thereafter, and without negotiable value from the time it was made. The considerations in payment for the contribution flowed to the payee at the time it was made—the protection of the commercial community, sympathy toward the Henry Waterhouse Trust Company clients who could ill afford to lose, and other commendable desires and motives of helpfulness and security, but there was no attempt to show and there is no evidence of record which would support a finding of fact that Alexander & Baldwin, Limited, would have suffered any loss had it not attempted to keep the Henry Waterhouse Trust Company a going concern.

XIV.

Plaintiff's books of account were kept on the cash basis of accounting, and during the calendar years 1924 to 1932, inclusive, they were so kept, and its federal income tax returns for those years were made on that basis of accounting.

XV.

Plaintiff charged off on its books of account in the calendar year 1931, \$25,000.00 of the face amount of the Henry Waterhouse Trust Company note of \$50,000.00, but did not take a deduction therefor in its income tax return for the taxable year 1931. Plaintiff charged off the \$25,000.00, being the balance of the face amount of the Henry Waterhouse note, on its books of account in the calendar year 1932, and claimed as deduction the entire amount of \$50,000.00 as a bad debt in computing its taxable net income for the taxable year 1932. The Commissioner of Internal Revenue disallowed the deduction of the \$50,000.00 paid by plaintiff to the Waterhouse Trust Company in 1931, as a bad debt deduction in computing its taxable net income for the taxable year 1932.

XVI.

In the year 1932 the plaintiff contributed to the Hawaii Bureau of Governmental Research \$1,000. This Bureau was organized under the laws of the Territory of Hawaii in 1928 by representatives of local business firms, and membership was available

to any taxpayer of Hawaii upon contribution of not less than \$10 a year.

In operation, the Bureau of Governmental Research offers, and during the entire calendar year 1932 it also offered, gratuitous advice and assistance to the Governor of the Territory and governmental bureaus and agencies, usually at their request; studies and devises plans designed to effect efficiency and economy in governmental administration; analyzes proposed legislation and makes recommendations thereon to the territorial legislature; and supplies interested organizations, such as churches, chambers of commerce, and groups of citizens, with information and counsel on proposed legislative measures. The bureau has no political aspects. Typical of the bureau's activities are a survey and suggested revision of the administrative organization of Maui County made in 1933 and an analysis of income tax returns made in 1934 at the request of an advisory committee on taxation to determine the ability to pay of various taxpayers.

The bureau is supported entirely by its members' voluntary contributions which range from \$10 to \$10,000 a year. An attempt is made to interest all of the people of the Territory of Hawaii in the bureau and make it a citizens agency. Contributions to the bureau are made by corporations, individuals, and chambers of commerce. Definite amounts are requested of the several members, apportioned on the basis of taxes paid, but each member is free to give what he wishes, and some

members contribute at intervals longer than a year, or sporadically. About 75 per cent of the bureau's receipts come from corporations.

In its federal income tax return for the calendar year 1932 the plaintiff deducted the amount of the above payment as an ordinary and necessary business expense, and the Commissioner of Internal Revenue after investigation determined that the amount was not allowable as a deduction for the reasons stated in his 90-day deficiency letter dated June 2, 1936.

XVII.

That on or before March 15, 1933, plaintiff filed in the office of the Collector of Internal Revenue for the District of Hawaii its said income tax return for the calendar year 1932; that thereafter the Commissioner of Internal Revenue, after an examination of said return, made certain adjustments and assessed an additional income tax against plaintiff for that taxable year in the amount of \$8,853.06, which plaintiff paid on October 6, 1936, to Fred H. Kanne, Collector of Internal Revenue for the District of Hawaii, together with interest thereon in the amount of \$1,863.51, making a total payment of tax and interest in the amount of \$10,716.57; that of the tax so paid, \$6,875.00 thereof resulted from the disallowance of the \$50,000.00 contribution made by plaintiff to the Waterhouse Company as a bad debt, and \$137.50 of said additional tax so paid resulted from the disallowance of the \$1,000.00 contributed to the Hawaiian Bureau of Govern-

mental Research, taken as a deduction in its tax return for that year.

XVIII.

That on November 27, 1936, plaintiff filed with the Collector of Internal Revenue for the District of Hawaii a claim for refund of \$10,716.57, representing the additional tax of \$8,853.06 and interest thereon in the amount of \$1,863.51 paid by plaintiff for the taxable year 1932; that under date of November 14, 1940, plaintiff was notified by registered letter that the Commissioner of Internal Revenue had determined upon consideration of its claim for refund that it had overassessed income tax for the taxable year 1932 in the amount of \$1,313.95 and interest in the amount of \$276.57, and that its claim for refund had been disallowed to the extent of the difference between the above amounts and the amounts claimed; that by Treasury check dated October 23, 1940, there was refunded to plaintiff the sum of \$1,971.87, representing an overpayment of income tax for the taxable year 1932 in the amount of \$1,313.95 and an overpayment of interest in the amount of \$276.57, and interest in the amount of \$381.35 on the sum of \$1,590.52 representing the overpayment of tax and interest; and no amount of income tax for the taxable year 1932, and interest thereon other than the amounts above stated has been refunded to the plaintiff herein.

Conclusions of Law

Upon the foregoing facts, testimony and evidence adduced in this case, the Court concludes as a matter of law as follows:

I.

The payment of \$50,000 made to the Henry Waterhouse Trust Company in 1931 by plaintiff was just a contribution. The note given by the Henry Waterhouse Trust Company in 1931 to plaintiff in acknowledgment of that contribution was contingent as to payment, being subject to such conditions as to render it non-negotiable and without any negotiable value at the time it was made and at all times thereafter, and therefore it could not be dealt with as a debt, and the Commissioner of Internal Revenue did not err in disallowing plaintiff a deduction therefor as a bad debt in computing plaintiff's taxable net income for the calendar year 1932.

II.

No part of this contribution of \$50,000 was deductible as a bad debt, ascertained to be worthless and charged off within the taxable year 1932 within the terms of Section 23(j) of the Revenue Act of 1932 or as a loss sustained during that taxable year not compensated for by insurance or otherwise, within the terms of Section 23(f) of the Revenue Act of 1932, and accordingly no part of said contribution was properly allowable as a deduction in computing plaintiff's taxable net income for the calendar year 1932.

III.

The aforesaid contribution by plaintiff in 1932 to the Hawaii Bureau of Governmental Research was usual and within ordinary business discretion a necessary and proper business practice. This contribution was an ordinary and necessary expense paid or incurred in carrying on plaintiff's business during the taxable year 1932, within the terms of Section 23(a) of the Revenue Act of 1932, and constituted a proper deduction in computing its taxable net income for that year. The Commissioner of Internal Revenue erred in disallowing this contribution as a deduction in computing plaintiff's taxable net income for the calendar year 1932.

Entry of judgment in conformity with the foregoing findings of fact and conclusions of law is hereby directed.

Dated at Honolulu, T. H., this 6th day of December, 1949.

/s/ D. E. METZGER,
Judge, United States
District Court.

[Endorsed]: Filed Dec. 7, 1949.

In the United States District Court for the
Territory of Hawaii

Civil No. 474

ALEXANDER & BALDWIN, a Hawaiian Cor-
poration,

Plaintiff.

vs.

AGNES M. KANNE, Executrix Under the Will
and of the Estate of Fred H. Kanne, Collector
of Internal Revenue of the United States for
the District of Hawaii,

Defendant.

JUDGMENT

Be it remembered that on November 12, 1947, there came on for trial the above-entitled and numbered action wherein this case having been submitted to the Court without a jury upon the pleadings, oral and documentary evidence, and a stipulation of facts, and argument of counsel, and the Court being sufficiently advised, and having made and filed its opinion and findings of fact and conclusions of law herein, now therefore, in pursuance thereto,

The Court having found that the plaintiff paid income taxes and interest assessed thereon for the taxable year 1932 as follows:

Dates of Payment	Tax	Interest
October 6, 1936.....	\$8,853.06	\$1,863.51
Less: Refund of overpayment made by Treasury check dated October 23, 1940	1,313.95	276.57
Net amounts paid	7,539.11	1,586.94
Adjusted liability	7,401.61	1,558.00
Overpayments	\$ 137.50	\$ 28.94

It is hereby ordered, adjudged, and decreed that the plaintiff have and recover from Agnes M. Kanne, Executrix under the will and of the estate of Fred H. Kanne, deceased, the defendant, formerly Collector of Internal Revenue for the District of Hawaii, the sum of \$166.44, representing an overpayment of federal income tax and interest for the taxable year 1932, together with interest thereon as provided by law from October 6, 1936, together with costs of this suit in the amount of \$43.37.

To the foregoing judgment the defendant in open court excepted.

Entered this 6th day of December, 1949.

/s/ D. E. METZGER,

United States District Judge.

Approved as to Form:

RAY J. O'BRIEN,

United States Attorney.

By /s/ HOWARD K. HODDISH,

Assistant United States
Attorney.

[Endorsed]: Filed and entered Dec. 7, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

This cause having come on for hearing before the Court without a jury, the case having been submitted upon the pleadings, oral and documentary evidence, and a stipulation of facts, and arguments as to the law, and the defendant having appeared herein by the United States Attorney for the District of Hawaii, and the Court having found partially in favor of the plaintiff, and judgment having been entered in favor of the plaintiff and against the defendant in the principal sum of \$166.44 representing an overpayment of federal income tax and interest for the taxable year 1932, together with interest thereon as provided by law from the date of payment, and costs of suit in the amount of \$43.37.

Now therefore, pursuant to Section 989 of the Revised Statutes of the United States, the Court hereby certifies there was probable and reasonable cause for the act of the defendant, Fred H. Kanne, Collector of Internal Revenue for the District of Hawaii, since deceased, and that he acted under the directions of the Secretary of the Treasury or other proper officials of the Government in demanding and collecting from plaintiff the internal revenue tax, for the refund of which the judgment in this case is rendered.

/s/ D. E. METZGER,

United States District Judge.

[Endorsed]: Filed Dec. 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alexander & Baldwin, Limited, a Hawaiian corporation, plaintiff above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from so much of the Final Judgment entered in this action on the 6th day of December, 1949, as denies to said plaintiff the recovery of the amount of \$8,351.13, with interest and costs, as prayed for in the complaint filed herein.

Dated: Honolulu, T. H., this 2nd day of February, 1950.

ALEXANDER & BALDWIN,
LIMITED By
PRATT, TAVARES &
CASSIDY,
Its Attorneys,
By /s/ V. O. BORTZ.

[Endorsed]: Filed Feb. 2, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Agnes M. Kanne, Executrix under the Will and of the Estate of Fred H. Kanne, Collector of Internal Revenue of the United States for the District of Hawaii, appellee in the above-entitled cause,

designates the following portion of the record in addition to those designated, to be contained in the record on appeal in this action:

1. Complete Docket Entries.

Dated: Honolulu, T. H., this tenth day of March, 1950.

RAY J. O'BRIEN,
United States Attorney, District of Hawaii, at-
torney for Appellee,

By /s/ WINSTON C. INGMAN,
Assistant U. S. Attorney,
District of Hawaii.

Receipt of Copy Acknowledged.

[Endorsed]: Filed Mar. 10, 1950.

[Title of District Court and Cause.]

DOCKET ENTRIES

1942

July 21—Filing Complaint.

Issuing Summons.

Making 3 certified copies for service.

July 22—Filing Marshal's returns to Summons
(executed).

Sept. 9—Filing Stipulation.

Filing Marshal's returns to Summons
(additional).

Oct. 17—Filing Answer.

1943

Oct. 28—Filing Motion to Amend Complaint and Notice.

Nov. 2—Entering proceedings at hearing on motion to amend complaint—motion granted.

Nov. 3—Filing Order Granting Motion to Amend Complaint.

Nov. 11—Filing Stipulation.

Nov. 19—Filing Answer to amended complaint.

1947

July 7—Filing Motion to substitute as defendant with consent of executrix.

Nov. 5—Entering order setting case for trial to Nov. 14, 1947, at 10 a.m.

Nov. 12—Stipulated that the evidence offered in Civil #419 relative to the Waterhouse Trust Co. transaction will be considered as part of the evidence in this case.

Dec. 16—Filing Application to Extend Time and Order.

1948

Jan. 2—Filing Statement of Disapproval of the Form of Defendant's Draft of Findings of Fact and Conclusions of Law.

Filing Proposed Additions and Amendments to Defendant's Draft of Findings of Fact and Conclusions of Law.

Feb. 11—Filing Defendant's Reply to Plaintiff's Disapproval of the Form of Defendant's Draft of the Findings of Fact and Conclusions of Law.

1948

Filing Additions and Amendments to the Draft of Findings of Fact and Conclusions of Law Heretofore Submitted by Defendant.

Mar. 18—Filing Decision—conforming copy—original filed in C #419.

1949

Oct. 10—Entering proceedings call calendar—To submit form of judgment.

Dec. 7—Filing Findings of Fact and Conclusions of Law.

Filing Judgment—Favor Plaintiff.
(Metzger.) (Prin. \$166.44 Costs \$43.37.)

Entered 12-7-49 at 9:45 a.m.

Filing Certificate of Probable Cause.

1950

Feb. 2—Filing Notice of Appeal (Plaintiff). Mailing copy to District Attorney.

Filing Bond for Costs on Appeal.

Mar. 2—Filing Designation of Record (Plaintiff-Appellant).

Mar. 10—Filing Designation of Record (Defendant-Appellee).

ALEXANDER & BALDWIN EXHIBIT "A"

Admitted.

In the United States District Court for the
Territory of Hawaii
Civil Action No. 474

ALEXANDER & BALDWIN, LIMITED, a Ha-
waiian Corporation,

Plaintiff,

vs.

AGNES M. KANNE, Executrix Under the Will and
of the Estate of Fred H. Kanne, Collector of
Internal Revenue of the United States for the
District of Hawaii,

Defendant.

STIPULATION I

It is hereby stipulated by and between the parties hereto through their respective attorneys that the following statements of fact shall be considered as true, and that either party may offer in evidence, oral testimony or any additional evidence, documentary or otherwise not inconsistent with the facts herein stipulated.

I.

That Alexander & Baldwin, Limited, the Plaintiff herein, is a corporation, incorporated under the laws of the Territory of Hawaii, having its principal office in Honolulu, City and County of Hono-

lulu, Territory of Hawaii; that Fred H. Kanne was the Collector of Internal Revenue of the United States for the District of Hawaii, and a resident of said Honolulu at all times from on or about August 1, 1933, until his death on December 24, 1946; that Agnes M. Kanne, the duly qualified and appointed Executrix of the Will and of the Estate of Fred H. Kanne, deceased, was substituted as Defendant in the above-entitled cause by order of the above-entitled court on March 6, 1947.

II.

Alexander & Baldwin, Limited, the Plaintiff herein, was organized under the corporation laws of the Territory of Hawaii in 1900 with its principal office in Honolulu, and has since acted as an agent or factor for several local sugar and pineapple companies and other companies as well, and as a commission merchant and as the representative of several mainland insurance companies. In 1932 it was the agent for five companies operating sugar plantations, three companies operating pineapple plantations, two ranches, and two railroad and stevedoring companies, all of which companies were local companies and had a total net worth of \$49,293,366. In 1932 Plaintiff's investment in the securities of the companies for which it acted as agent or factor amounted to over \$11,000,000; and Plaintiff had other investments including an investment of \$1,252,360.38 in its home office building in Honolulu, Territory of Hawaii. On December 30, 1930, Alexander & Baldwin, Limited, and the com-

panies for which it served as agent had on deposit in the banks of the Territory of Hawaii at least a total sum of \$2,275,000.00. The Defendant objects to admissibility in evidence of the aforesaid facts on the ground of their immateriality and irrelevance.

III.

The Henry Waterhouse Trust Company, Limited (hereinafter called the Waterhouse Company, was incorporated under the laws of the Territory of Hawaii on November 26, 1902, to engage in the business usual and permitted to a trust company under the laws of the territory. In addition to engaging in the usual fiduciary business common to all trust companies, it operated a plantation agency department, a real estate department, a stock and bond brokerage department, and an insurance department, and at times invested in stocks and bonds to a limited extent on its own account, these various activities being permissible under the Hawaiian statutes.

IV.

In the middle of October, 1930, Waterhouse increased its capital stock from \$200,000 to \$400,000, consisting of 4,000 shares of a par value of \$100 each. The new shares were all taken by the old stockholders who paid for them in cash at par. In November the effects of the general business depression began to be felt in the Territory of Hawaii, and as a large part of the Waterhouse

assets consisted of real estate and mortgages, its secretary became apprehensive that if many calls were made on its demand accounts the Company's financial condition would not be sufficiently liquid to meet its cash requirements. He discussed the situation with the treasurer and auditor of Waterhouse and then advised the management of Bishop Trust Company, Limited, hereinafter called Bishop Trust, that a sale of the stock might be arranged, suggesting a price of \$100 each or more for the shares.

V.

An Audit Report dated March 31, 1931, signed H. C. Tennent and Co. by E. J. Greaney disclosed the book value of assets of the Waterhouse Company as of February 14, 1931, to be in the amount of \$4,820,090.92 and the liabilities, exclusive of capital and surplus, to be in the amount of \$4,149,437.06. This Audit Report contained the following statement:

"The Contingent Reserve (for losses) of \$680,803.15 and the Special Contingent Reserve of \$400,000.00 referred to above, are considered adequate to cover probable losses in the realization of the assets and liquidation of liabilities."

It is also stated in the Report that the principal purpose of the Audit was to establish as accurately as possible the total assets and liabilities as of February 14, 1931, the date control of the Company passed to the Bishop Trust Company, Limited,

through its acquiring all of the stock of the Waterhouse Company.

It is also stated in the Report that Exhibit A attached thereto, a copy of which is hereunto annexed and made a part hereof as Exhibit A, shows the Capital and Surplus of the Waterhouse Company as of February 14, 1931, before adjustment, the total estimated losses finally agreed upon as acceptable to the Bishop Trust Company, Limited, and the manner of arriving at the Contingent Reserve (for Losses) and the Special Contingent Reserve. In this connection, the Report states, by way of explanation of said Exhibit A, that the balance sheet shows the Profit and Loss account with a debit balance of \$400,000.00 offset against the Contingent Reserve (for Losses); and that this appears as preferable for balance sheet purposes to the alternative of clearing the Capital Stock Account, and produces the same net result.

By way of explanation of Exhibit D attached to the Report, it is stated that the Special Contingent Reserve, as shown in Exhibit A above, will remain intact until actual losses written off have fully exhausted the Contingent Reserve (for Losses) of \$779,717.23; and that additional losses as determined will then be applied pro rata against the Special Contingent Reserve contributions.

VI.

Mr. A. W. T. Bottomley, president of American Factors, Limited, and of the Bishop First National Bank of Honolulu and vice-president of the Bishop

Trust Company, Limited, called a conference of the heads of the four Hawaiian sugar agencies, the president of the Bank of Hawaii, Limited, the president of the Hawaiian Trust Company, Limited, and two members of the finance committee of the Bishop Trust Company, Limited, to present to them the financial condition of the Waterhouse Company and discuss the feasibility of making some plan to prevent the Waterhouse Company from being forced into liquidation.

VII.

The Waterhouse Company was conducting business as usual but was encountering some financial difficulties; economic conditions were not clear, and, after the investigation, the executives of the Bishop Trust Company, Limited, wished to look further into the matter before acting. After February 1, 1931, the Bishop Trust Company, Limited, advised the Waterhouse Company shareholders that it would not pay cash for their shares as had previously been suggested. On Saturday, February 14, 1931, Mr. W. F. Frear, president of the Bishop Trust Company, Limited, at a meeting of the board of directors of that company made a statement which was recorded on the minutes as follows:

“This is a special meeting called to consider a proposition to take over the Henry Waterhouse Trust Co., Ltd. At first it was a proposition to purchase the stock of that company, somewhat as we purchased the stock of the Pacific Trust Co., but

as a result of investigation, it changed largely to a salvage proposition.

“The plan now is for our Company to acquire all the stock of the Waterhouse Trust Co. without cost; for Mr. and Mrs. R. W. Shingle and Mr. A. N. Campbell, in settlement of their indebtedness to the Company, to pay into it \$535,000.00 and to convey to its order their respective 18% and 10% undivided interests in certain land, fish ponds and fishery at Kalihi, the same to be sold for \$87,000.00 and the proceeds, with \$13,000.00 additional contributed by the Bishop Trust Co., to make up an even \$100,000.00, to be paid into the Waterhouse Trust Co., making in all \$635,000.00 thus paid in. In addition, a number of corporations and individuals are to contribute various sums aggregating \$400,000.00, thus making altogether \$1,035,000.00 of cash to be paid into the Waterhouse Trust Co. The Bishop Trust Co. is to pay such amount, if any, as may be required in addition to enable the Waterhouse Trust Company to meet its liabilities, but it is hoped that no such contribution will be required. That, however, remains to be seen.

“The Bishop Trust Co. is to take over, without other cost, the business of the Waterhouse Trust Co., other than the assets and liabilities, and to operate such business at its own expense and for its own benefit. This will include the trusts, executorships, agencies, insurance, safe deposit business, etc., with the necessary furniture, equipment and supplies therefor. It is hoped also that the Bishop

Trust Co. will profit through making new contacts. The stock and bond and real estate departments will probably be discontinued.

“The assets and liabilities of the Waterhouse Trust Co. are to be gradually liquidated by applying the assets to the liabilities, together with the expenses of liquidation, including \$1,000.00 a month to be paid to the Bishop Trust Co. for supervision.

“In final settlement, if there is an excess of assets over liabilities, it is to be applied, first, to the reimbursement of the amount, if any, that may be contributed by the Bishop Trust Co. in addition to the \$1,035,000.00, and, secondly, pro rata to the contributors of the \$400,000.00 with simple interest at 4%, and, thirdly, the balance, if any, to go to the Bishop Trust Co.

“There are three objects: First, to prevent the failure of such a company as the Waterhouse Trust Co., with the consequent general disastrous effects; secondly, to prevent loss on the part of many who have entrusted their money to the Company for investment and who can ill afford the loss; and, thirdly, to enable the Bishop Trust Co. to acquire new business. These three objects naturally appeal with different degrees of force to different groups of contributors.”

The plan, as outlined, was approved by the Board of directors of the Bishop Trust Company, Limited, at that meeting. The transactions mentioned in the second paragraph of Mr. Frear's statement, *supra*, were duly performed within a few days after February 14, 1931.

VIII.

Prior to the consummation of the transactions hereinbefore mentioned, the following individuals and corporations promised to pay to the Waterhouse Company, upon consummation of the proposed plan, the sums of money set opposite their names, to wit:

Name of Contributor	Amount Paid
The Bishop Company, Limited.....	\$100,000
American Factors, Limited.....	50,000
Alexander & Baldwin, Limited.....	50,000
Castle & Cooke, Limited.....	50,000
W. R. Castle.....	50,000
Beatrice Castle Newcomb.....	50,000
Bank of Hawaii.....	25,000
Hawaiian Trust Company, Limited.....	25,000
Total.....	<u>\$400,000</u>

IX.

Annexed hereto as Exhibit B and made a part hereof is an excerpt from the minutes of the meeting of the Board of Directors of Alexander & Baldwin, Limited, held on February 25, 1931, authorizing the aforesaid payment of \$50,000 to the Waterhouse Company. There are also annexed hereto and made a part hereof as Exhibits C, D, E, F and G, excerpts from the minutes of the Directors' meetings of the corporations who made their respective payments to the aforesaid \$400,000 fund of the Waterhouse Company.

X.

The plan of reorganization of the Waterhouse Company was carried out as outlined above, and the individuals and corporations whose names appear in

the preceding paragraph of this stipulation actually paid into the Waterhouse Company the amounts of money stated opposite their respective names upon the provisions concerning the repayment thereof as more particularly stated in the letters to Plaintiff dated February 21, 1931, and February 24, 1931, copies of which are attached hereto and made a part hereof as Exhibits H and I, respectively. Letters identical in form as Exhibits H and I were addressed to each of the individuals and corporations that made payments to the Waterhouse Company aggregating \$400,000, and said letters were duly received by each such individual and corporation.

XI.

Attached hereto and made a part hereof for all purposes and marked Exhibit J is a true copy of a note executed and delivered by the Waterhouse Company to Plaintiff in the principal sum of \$50,000.00, being the note referred to in said letter, Exhibit H. Notes identical in form were executed and delivered by the Waterhouse Company to each such other corporation and to each such individual, which said notes were in each instance for the principal sum of money as stated opposite the name of the respective individuals and corporations hereinbefore stated.

XII.

The actual owners of the capital stock of the Waterhouse Company on February 14, 1931, shortly

prior to the transfer of the stock of that company to the Bishop Trust Company, Limited, were as follows:

Stockholder	Shares	Par Value
A. N. Campbell	1,235	\$123,500.00
R. W. Shingle.....	1,235	123,500.00
A. L. Castle.....	700	70,000.00
J. K. Clarke.....	480	48,000.00
Harriet E. Wight.....	100	10,000.00
C. L. Wight.....	100	10,000.00
Marietta Withington	50	5,000.00
Arthur Withington	50	5,000.00
Estate of E. M. Lewis.....	50	5,000.00
Total.....	4,000	\$400,000.00

XIII.

The four stockholders whose names appear first on the above list, namely, A. N. Campbell, R. W. Shingle, A. L. Castle and J. K. Clarke, were directors of the Waterhouse Company. Mr. W. R. Castle, father of A. L. Castle, purchased from the stockholders, other than Messrs. Campbell, Shingle and Clarke, their shares of the capital stock of the Waterhouse Company as follows:

Stockholder	Shares	Par Value
Harriet E. Wight	100	\$10,000.00
Charles L. Wight.....	100	10,000.00
Marietta Withington	50	5,000.00
Arthur Withington	50	5,000.00
Estate of E. M. Lewis.....	50	5,000.00
Total.....	350	\$35,000.00

Thus, on February 14, 1931, the following persons were the stockholders of the Waterhouse Company,

and they were the owners of the number of shares shown opposite their names, to wit:

Stockholder	Shares	Par Value
A. N. Campbell	1,235	\$123,500.00
R. W. Shingle.....	1,235	123,500.00
A. L. Castle.....	700	70,000.00
W. R. Castle.....	350	35,000.00
J. K. Clarke.....	480	48,000.00
Total.....	4,000	\$400,000.00

XIV.

The \$400,000 par value of capital stock of the Waterhouse Company was transferred by the afore-said stockholders to the Bishop Trust Company, Limited, as of February 14, 1931, and the cash balances, properties, stocks and bonds, accounts, books and records of the Waterhouse Company came under the management and control of the new stockholder, the Bishop Trust Company, Limited. New officers and directors were elected, a finance committee, comprised of officers and directors, and an advisory committee comprised of representatives of the \$400,000 noteholders, were appointed, and work was immediately commenced on the liquidation of the Waterhouse Company.

XV.

There is annexed hereto as Exhibit K and made a part hereof condensed balance sheets of the Waterhouse Company as at February 14, 1931, before and after the reorganization.

XVI.

On May 29, 1931, the vice-president and manager of the Bishop Trust Company, Limited, who was also

a director of the Waterhouse Company, stated to the board of directors of the Bishop Trust Company, Limited, that the operation of the Waterhouse Company business was causing a monthly loss "as it is in the nature of a receivership." He added the belief that "the bulk of the work in straightening out the affairs of the company will be accomplished within a year or two." At a meeting of June 26, 1931, he advised the board of directors of the Bishop Trust Company, Limited, that:

"* * * he had made a recommendation to the Bishop Trust Company of a transfer of all of the work of the Waterhouse Trust Company directly to the Bishop Trust Company, with the exception of the collection agency end of the business."

At the same time he stated his belief that the Bishop Trust Company, Limited, would suffer no loss if business should again become normal. Thereupon the Bishop Trust Company, Limited, took over some of the Waterhouse Company business, but the Waterhouse Company continued to do some business until it, the Guardian Trust Company, Limited, and the Pacific Trust Company, Limited, were formally merged into the Bishop Trust Company, Limited, on December 30, 1933, as hereinafter set forth.

XVII.

There is annexed hereto as Exhibit L and made a part hereof condensed balance sheets of the Waterhouse Company as at December 31, 1931, and December 31, 1932.

XVIII.

The advisory committee referred to in Exhibit I was composed of prominent business and professional men who represented the aforesaid note holders who had made payments into the aforesaid \$400,000.00 fund. The original committee consisted of:

1. A. W. T. Bottomley (now deceased) whose alternates were S. M. Lowrey, who was then treasurer of American Factors, Limited, and H. A. Walker who is now president of American Factors, Limited.

2. C. H. Cooke, then president of the Bank of Hawaii, Limited, whose alternates were R. McCorriston, now a vice-president of the Bank of Hawaii, Limited, G. G. Fuller, now retired, who was a vice-president of the Bank of Hawaii until his retirement, and E. W. Carden who is now president of the Bank of Hawaii.

3. A. L. Castle, an attorney at law, at present a partner in the firm of Robertson, Castle & Anthony, whose alternates were F. C. Atherton (now deceased) then the president of Castle & Cooke, Limited, and A. G. Budge, now president of Castle & Cooke, Limited.

The composition of the advisory committee changed from time to time thereafter and among the other persons who attended meetings as a member of the committee was: James L. Cockburn who was then the executive vice-president of Bishop & Company, Limited.

This committee met frequently with the finance committee of the Waterhouse Company and passed upon all matters of importance affecting that Company and particularly those matters tending to affect the amount of reimbursement, if any, ultimately to be made to the special note holders. It advised with Bishop Trust Company, Limited, and its members were consulted from time to time by the Plaintiff and other special note holders.

XIX.

Under date of July 18, 1932, the Waterhouse Company, over the signature of M. B. Henshaw, vice-president, dispatched to the Plaintiff a letter, a true copy of which is annexed hereto as Exhibit M and made a part hereof. The defendant objects to the admissibility in evidence of Exhibit M on the following grounds, viz: (a) that the statements made therein are immaterial to any issue involved herein; and (b) that its admission in evidence for the purpose of proving the truth and accuracy of the statements made therein concerning the reappraisal of the assets and liabilities of the Waterhouse Co., and the competency and accuracy of such reappraisal would constitute a violation of the hearsay rule, and such evidence is also incompetent. Letters identical in form to Exhibit M were dispatched by the Waterhouse Company to the other noteholders and received by them. The advisory committee was not abrogated but continued to function as usual during the balance of the year 1932 and the year 1933.

XX.

During 1933 for the stated purpose of simplifying its financial structure and effecting economies, Bishop Trust Company, Limited, decided to effect a merger. Attached hereto, made a part hereof for every purpose, and marked Exhibit N is a copy of a letter dated December 19, 1933, sent by the Waterhouse Company to the Bishop Company, Limited. Letters identical in form with Exhibit N were sent to and received by each of the aforesaid Waterhouse Company noteholders.

XXI.

On December 21, 1933, a meeting of the said Waterhouse Company noteholders was held at which the holders of \$300,000 out of a total of \$400,000 of the notes outstanding were represented as follows:

Noteholder	Representative	Amount of Note Held
American Factors, Ltd.	S. M. Lowrey	\$ 50,000
Alexander & Baldwin, Ltd.	C. R. Linden	50,000
The Bishop Company, Ltd.	George P. Rea	100,000
W. R. Castle	Alfred L. Castle	50,000
Alfred L. Castle, as executor under will of Beatrice Castle Newcomb, deceased	Alfred L. Castle	50,000
	Total	<u>\$300,000</u>

The noteholders who were not represented at this meeting were:

Noteholder	Amount of Note
Castle & Cooke, Ltd.	\$ 50,000
Bank of Hawaii	25,000
Hawaiian Trust Co., Ltd.....	25,000
Total	<u>\$100,000</u>

Present by invitation were Messrs. C. F. Weeber and M. B. Henshaw. The minutes of the meeting record that——

“Mr. Henshaw stated that the purpose of the meeting was to consider the letters dated December 19 which had been sent out to all of the corporations and/or individuals who had loaned money to Henry Waterhouse Trust Co., Ltd., in February, 1931,” and after some discussion it was the unanimous opinion of those present that proposal No. 1 as set forth in the letters dated December 19, 1933 (Exhibit N), be approved.

The minutes of that meeting also record that——

“Mr. Linden suggested that after the proposed merger the Advisory Committee be continued, at least until such time as the question of whether the notes held by the underwriters become a loss in the year 1932, is definitely settled. It was the concensus of opinion that this suggestion be followed.”

XXII.

Following the merger aforesaid, on December 30, 1933, the Bishop Trust Company, Limited, for the purpose of accounting to the aforesaid noteholders kept separate accounting records referred to as the “Waterhouse Section,” of the Waterhouse Company assets acquired and the liabilities assumed in respect thereto. Among the records so kept, a special account designated “Notes Payable—Underwriters H W T—New” was set up to cover the \$400,000 paid in by the aforesaid noteholders and the charges

against it. This account at December 30, 1933, showed a credit balance of \$400,000.

XXIII.

The following is a statement of book value of the Waterhouse Company assets, exclusive of cash, on the indicated-dates, actual losses sustained on liquidation to the indicated dates, set up on the latter's books, and the estimated losses on liquidation arrived at by a group of officers of the Bishop Trust Company, Limited:

	Book value of assets exclusive of cash	Actual losses sustained on liquidation	Estimated loss on liquidation
Feb. 14, 1931	\$4,275,543.05	-----	\$1,080,803.15
Dec. 31, 1931	3,697,746.38	\$324,913.77	-----
1932	2,993,234.31	410,345.80	-----
1933	2,965,675.99	571,482.80	*936,352.98

XXIV.

Plaintiff's books of account were kept on the cash basis of accounting, and, during the calender years 1924 to 1932, inclusive, they were so kept, and its Federal Income Tax returns for those years were made on that basis of accounting.

XXV.

The following is a statement of the journal entries in the books of Alexander & Baldwin, Limited, with

*Estimate made by Bishop Trust Company's comptroller of the losses that would be sustained on the liquidation of the remaining assets.

reference to the Henry Waterhouse Trust Company note for \$50,000.00:

(December 31, 1931, July-December Journal Page 151.)

Profit & Loss	\$25,000.00
Bills Receivable	\$25,000.00

1/2 note H. Waterhouse Trust Co. 2/21/31 written off.

(August 8, 1932, July-December Journal Page 32.)

Profit & Loss	\$25,000.00
Bills Receivable	\$25,000.00

Balance of note of H. Waterhouse Trust Co. for \$50,000.00 dated Febr. 21, 1931, written off uncollected. Refer to letter H. W. T. Co. 7/18/32

XXVI.

In the Plaintiff's federal income tax return for the taxable year 1932, at item 20 on page 1 thereof, the Plaintiff took as a bad debt deduction the entire amount of \$50,000 paid by Plaintiff to the Waterhouse Company in 1931. After investigation by his revenue agents and after protest and hearing accorded Plaintiff's representatives, the Commissioner of Internal Revenue determined that the \$50,000 paid to the Waterhouse Company was not allowable as a bad debt deduction for the year 1932.

XXVII.

In the year 1932 the Plaintiff contributed to the Hawaii Bureau of Governmental Research \$1,000.

This bureau was organized under the laws of the Territory of Hawaii in 1928 by representatives of local business firms, and membership was available to any taxpayer of Hawaii upon contribution of not less than \$10 a year.

In operation, the Bureau of Governmental Research offers, and during the entire calendar year 1932 it also offered, gratuitous advice and assistance to the Governor of the Territory and governmental bureaus and agencies, usually at their request; studies and devises plans designed to effect efficiency and economy in governmental administration; analyzes proposed legislation and makes recommendations thereon to the territorial legislature; and supplies interested organizations, such as churches, chambers of commerce, and groups of citizens, with information and counsel on proposed legislative measures. The bureau has no political aspects. Typical of the bureau's activities are a survey and suggested revision of the administrative organization of Maui County made in 1933 and an analysis of income tax returns made in 1934 at the request of an advisory committee on taxation to determine the ability to pay of various taxpayers.

The bureau is supported entirely by its members' voluntary contributions which range from \$10 to \$10,000 a year. An attempt is made to interest all of the people of the Territory of Hawaii in the bureau and make it a citizens agency. Contributions to the bureau are made by corporations, individuals, and chambers of commerce. Definite amounts are

requested of the several members, apportioned on the basis of taxes paid, but each member is free to give what he wishes, and some members contribute at intervals longer than a year, or sporadically. About 75 per cent of the bureau's receipts come from corporations.

In its federal income tax return for the calendar year 1932 the taxpayer deducted the amount of the above contribution as an ordinary and necessary business expense, and the Commissioner of Internal Revenue after investigation determined that the amount was not allowable as a deduction, for the reasons stated in his 90-day deficiency letter dated June 2, 1936.

VITOUSEK, PRATT & WINN,
By /s/ C. DUDLEY PRATT,
Counsel for Plaintiff.

/s/ RAY J. O'BRIEN,
United States Attorney,
District of Hawaii,
Counsel for Defendant.

/s/ LELAND T. ATHERTON,
Special Assistant to the Attorney General of Coun-
sel for Defendant.

EXHIBIT A

Henry Waterhouse Trust Co., Ltd.
Analysis of Capital Adjustments for Reorganization
February 14th, 1931

Capital and Surplus Before Adjustment :

Capital Stock		*\$400,000.00
Surplus Earned	\$ 200,000.00	
Profit and Loss	158,575.93*	
Special Reserve	15,000.00	
Sundry Accounts Special	1,141.30	
Reserve for Taxes	5,000.00	

Total Surplus 379,717.23

Total Capital and Surplus transferred to Reserve..... \$779,717.23

Shingle and Campbell

Accounts Net ..	\$ 733,914.08
Estimated Losses	1,080,803.15

Total (Basis for Reorganization) \$1,814,717.23

Payments:

R. W. Shingle	\$ 492,137.23
A. N. Campbell.....	142,862.77

Total Direct Payments....\$ 635,000.00

Bishop First Nat'l Bank....	\$ 100,000.00
Bank of Hawaii, Ltd.	25,000.00
Hawaiian Trust Co., Ltd..	25,000.00
American Factors, Ltd.	50,000.00
Alexander & Baldwin, Ltd.	50,000.00
Castle & Cooke, Ltd.	50,000.00
W. R. Castle	50,000.00
Beatrice Castle Newcomb..	50,000.00

Total Contingent

Payments\$ 400,000.00

Total Payments \$1,035,000.00

Balance of estimated losses to apply against reserve
created by transfer from Surplus..... \$779,717.23

* For balance sheet purposes a debit balance of \$400,000.00 is set up in the Profit and Loss Account to offset the Capital Stock Account which stands with a credit balance of \$400,000.00.

EXHIBIT B

Excerpt From Minutes of Directors' Meeting of
Alexander and Baldwin, Limited, Held February
25, 1931

Loan to Henry Waterhouse Trust Company, Ltd.

On motion by Mr. Galt, seconded by Dr. Dean, the loan of \$50,000.00 to the Henry Waterhouse Trust Company, Limited, which had been made with the informal approval of a majority of the Board, was also formally ratified and confirmed.

EXHIBIT C

Excerpt From Minutes of Directors' Meeting of
American Factors, Limited, Held March 2,
1931

“President Bottomley informed the Directors of the circumstances surrounding the taking over of the business of the Henry Waterhouse Trust Company, Limited, by the Bishop Trust Company, Limited, and stated that, following consultation with such of the Directors as he was able to reach in the time available, it was deemed advisable in the interests of the business community as a whole that this Company join with others in certain financing required for this transaction. President Bottomley stated further that a loan had been made to the Henry Waterhouse Trust Company, Limited, in the amount of \$50,000.00 against its note dated February 21st, 1931, bearing 4% interest, and repayable when and if in the opinion of the officers of the

Bishop Trust Company, Limited, the sound assets of the Henry Waterhouse Trust Company, Limited, are equal to its liabilities and asked the approval of the Directors of his action in agreeing to make this loan. On motion of Mr. Atherton, seconded by Mr. Dillingham and carried unanimously, the action of President Bottomley in authorizing the above-mentioned loan was ratified and approved."

EXHIBIT D

Excerpt From Minutes of Directors' Meeting of
Hawaiian Trust Company, Limited, Held February 26, 1931

Loan to Henry Waterhouse Trust Company, Ltd.

President Galt stated that he had been reliably informed that Henry Waterhouse Trust Company, Ltd., had become seriously involved financially, and that our company and others had rendered assistance; our company to the extent of a \$25,000.00 loan, in order to protect the four or five hundred depositors of the Henry Waterhouse Trust Company.

Director Hemenway moved that this loan of \$25,000.00 to Henry Waterhouse Trust Company, Limited, be approved. The motion was seconded by Director McInerny and carried unanimously.

EXHIBIT E

Excerpt From Minutes of Directors' Meeting of
Castle and Cooke, Limited, Held March 5,
1931

President F. C. Atherton referred to the letter circulated among the Directors under date of February 24, 1931 (copy appended hereto) recommending that the sum of \$50,000.00 be loaned to the Henry Waterhouse Trust Company, Limited, to prevent that company from going into bankruptcy and thus causing widespread financial losses throughout the community. Although this loan had been informally approved by the Directors, in view of the importance of the subject it would seem advisable to take formal action at this time approving and ratifying the original action and also placing the foregoing letter in the records of the Company.

It was moved by Director Atherton Richards and seconded by Director H. K. L. Castle that the Directors hereby formally ratify and approve their action taken informally under date of February 24, 1931, authorizing a loan of \$50,000.00 to the Henry Waterhouse Trust Company, Limited, in conjunction with other loans to the said Company by other business houses of this city, and that the letter of President F. C. Atherton to the Directors referred to above be placed on record in the Minute Book; that in view of the rumors which are in circulation in the community regarding the financial condition of the said Henry Waterhouse Trust Company, Limited, the proper officers of this company are

hereby requested to ask the Territorial Government to make such review of the transactions and records of the Henry Waterhouse Trust Company, Limited, as is deemed appropriate and desirable.

Carried.

EXHIBIT F

Excerpt From Minutes of Directors' Meeting of
Bank of Hawaii Held March 12, 1931

"The President read . . . Report of the Advisory Committee of March 11, 1931, in which no comments were made on the loans granted from February 15th to 28th, 1931. The Committee called the attention of the Directors to the loan of \$25,000.00 to the Henry Waterhouse Trust Company, Limited, at a special rate of interest—4%."

EXHIBIT G

Excerpt From Minutes of Directors' Meeting of
the Bishop Company, Limited, Held March 12,
1931

"It was moved by Director John Waterhouse, seconded by Director Ellis and unanimously carried

"That the loan to Henry Waterhouse Trust Company, Limited, of \$100,000.00 at four per cent, on conditional note of the company, be and the same hereby is approved and confirmed and that copies of the note and letters as submitted outlining terms and conditions of repayment of the note be incorporated in these minutes."

EXHIBIT H

Honolulu, Hawaii.

February 21, 1931.

The Bishop Company, Limited,
Honolulu, T. H.

Gentlemen:

We outline as follows the plan in regard to the Henry Waterhouse Trust Company, Limited.

1. The Bishop Trust Co., Ltd., has acquired all of the capital stock of the Henry Waterhouse Trust Co., Ltd.

2. In settlement of their indebtedness to the Henry Waterhouse Trust Co., Ltd., R. W. Shingle and wife have paid into that Company \$435,000.00; A. N. Campbell has paid into it \$100,000.00; and R. W. Shingle and A. N. Campbell are to convey to the Company or to its order their respective 18% and 10% undivided interests in certain land, fish ponds and fishery at and near Mokauea, Kalihikai, Honolulu, the same to be sold and the proceeds thereof, plus such additional sum (to be contributed by Bishop Trust Co., Ltd.) as shall be necessary to make a total of \$100,000.00, to be paid to the Henry Waterhouse Trust Co., Ltd.

3. The following corporations and individuals have contributed or are to contribute the following sums to the Henry Waterhouse Trust Co., Ltd.: The Bishop Co., Ltd., \$100,000.00; American Factors, Ltd., Alexander & Baldwin, Ltd., Castle &

Cooke, Ltd., W. R. Castle and Beatrice Castle Newcomb each \$50,000.00; and the Bank of Hawaii, Ltd., and the Hawaiian Trust Co., Ltd., each \$25,000.00. For the amounts of these contributions notes of the Henry Waterhouse Trust Co., Ltd., of even date herewith, bearing simple interest at the rate of four per cent (4%) per annum, have been or will be given to the respective contributors, payable, however, only as provided in paragraph 8.

4. The Bishop Trust Co., Ltd., will ultimately contribute such amount, if any, over the above sums aggregating \$1,035,000.00, as may be required to liquidate the liabilities (other than the sums or notes mentioned in paragraph 3) of the Henry Waterhouse Trust Co., Ltd.

5. The Bishop Trust Co., Ltd., will take over, own and operate at its own expense and for its own benefit, in its own name or in the name of the Henry Waterhouse Trust Co., Ltd., the business (with such of the furniture, equipment and supplies as shall be required therefor) other than the assets subject to the liabilities (referred to in paragraph 6) of the Henry Waterhouse Trust Co., Ltd., any of the business so taken over by the Bishop Trust Co., Ltd., may by it be discontinued, sold or merged with its other business.

6. The assets and liabilities of the Henry Waterhouse Trust Co., Ltd., will gradually be liquidated by applying the assets or their proceeds and the income therefrom to (a) the expenses involved in such liquidation (such as salaries, taxes, rent, in-

surance, legal, auditing, bank examiner, postage, cables, books, stationery, etc.); (b) \$1,000.00 per month to the Bishop Trust Co., Ltd., for overhead or supervision; (c) interest payable; (d) indebtedness; and (e) other liabilities, if any. The assets shall be deemed to include cash on hand, bank deposits, notes and accounts receivable, stocks and bonds, stock exchange seat, and furniture, equipment and supplies (except as otherwise provided in paragraph 5) owned by the Henry Waterhouse Trust Co., Ltd., at the close of business on February 14, 1931, and the sums since paid or to be paid in as set forth in paragraphs 2, 3 and 4; the liabilities shall be deemed to include all liabilities of the company as of that date, and liabilities subsequently incurred in connection with the liquidation; the expenses of operation shall be deemed to include, besides other items, the cost of investigation by accountants preliminary to the reorganization, the cost of an audit of the Company's affairs and of the set-up of the accounting system at the outset by accountants, a proper pro rata of salaries of officers and employees of the Bishop Trust Co., Ltd., transferred temporarily for the reorganization, rehabilitation and readjustment of the affairs of the Henry Waterhouse Trust Co., Ltd., at the outset and a proper pro rata of the salaries of officers and employees of the Henry Waterhouse Trust Co., Ltd., so long as their services are rendered in part in connection with the liquidation and in part in connection with the business taken over

by the Bishop Trust Co., Ltd. It is proposed, for convenience, efficiency and economy, to transfer the various branches of the business to the Bishop Trust Building as soon as the circumstances warrant.

7. In final settlement, the excess, if any, of the assets as defined in paragraph 6 or their proceeds and the income therefrom over the payments specified in paragraph 6 is to be applied, so far as it will go, in the following order of priority: First, to reimbursing the Bishop Trust Co., Ltd., for such amount, if any, without interest as may be contributed by it under paragraph 4 above; secondly, to paying pro-rata, principal and interest, the notes mentioned in paragraph 3, and thirdly, the balance, if any, of such excess to be paid to the Bishop Trust Co., Ltd.

8. The Henry Waterhouse Trust Co., Ltd., may from time to time borrow money (from the Bishop Trust Co., Ltd., and/or others) to meet its requirements in connection with the liquidation and repay the same with interest. The notes (principal and interest) mentioned in paragraph 3 shall be payable only if and to the extent that there shall be an excess of assets available therefor in final settlement after the payments specified in paragraph 6 and the reimbursement of the Bishop Trust Co., Ltd., provided for in subdivision First of paragraph 7. The books of the Henry Waterhouse Trust Co., Ltd., shall be closed at the end of each calendar half year and a financial statement for such half

year shall thereupon be furnished to each of the contributors named in paragraph 3. Such contributors shall have the right to inspect the books of the Company at all reasonable times.

Very truly yours,

HENRY WATERHOUSE TRUST
COMPANY, LIMITED,

By W. F. FREAR,
Its President

By W. A. WHITE
Its Treasurer.

Approved:

BISHOP TRUST COMPANY, LIMITED

By W. F. FREAR
Its President

By E. W. SUTTON
Its Treasurer.

EXHIBIT I

Honolulu, Hawaii,
February 24, 1931

The Bishop Co., Ltd.,
Honolulu, T. H.

Gentlemen:

Supplementing our letter of the 21st instant in regard to the Henry Waterhouse Trust Co., Ltd.:

1. There is a Finance Committee, consisting at present of M. B. Henshaw, J. L. Cockburn and E. W. Sutton, for frequent consultation on numer-

ous matters, including many that naturally it would be impracticable to bring before the Advisory Committee referred to in the next paragraph.

2. There will be an Advisory Committee for passing upon various matters of importance, particularly those tending to affect the amount of reimbursement, if any, ultimately to be made to the contributors mentioned in paragraph 3 of the letter above referred to—such matters as sales of stocks and bonds owned by the Company, compromises of claims by or against the Company, etc. This Committee will consist for the present of A. W. T. Bottomley, C. H. Cooke and A. L. Castle, with alternates as follows to act in their several respective places when they cannot act: H. A. Walker and S. M. Lowrey, alternates to A. W. T. Bottomley; R. McCorriston and E. W. Carden, alternates to C. H. Cooke; F. C. Atherton and A. G. Budge, alternates to A. L. Castle.

Very truly yours,

HENRY WATERHOUSE TRUST
COMPANY, LIMITED,

By W. F. FREAR,

Its President

By W. A. WHITE

Its Treasurer.

Approved:

BISHOP TRUST COMPANY, LIMITED

By W. F. FREAR

Its President

By E. W. SUTTON

Its Treasurer.

EXHIBIT J

February 21, 1931

(\$50,000.00)

For value received, the Henry Waterhouse Trust Company, Limited, promises to pay to Alexander & Baldwin, Limited, Fifty Thousand Dollars (\$50,000.00), with interest thereon from date at the rate of four per cent (4%) per annum, payment of principal and interest to be made only when, if and to the extent that there shall be funds available therefor as set forth in letter of this date from the payor to the payee.

HENRY WATERHOUSE TRUST
COMPANY, LIMITED,

By W. F. FREAR
Its President

By W. A. WHITE
Its Treasurer

EXHIBIT K

Henry Waterhouse Trust Company Balance Sheets

	As at 2/14/31 (Before Re- organization)	As at 2/14/31 (After Re- organization)
Assets:		
Cash	\$ 9,547.87	\$1,044,547.87
Investments	605,181.47	605,181.47
Receivables	77,184.34	77,184.34
Trust and agency accounts (Shingle & Campbell)	733,914.08	.....
Other trust & agency accounts	1,439,567.36	1,439,567.36
Loans	1,978,492.73	1,978,492.73
Other assets	75,117.15	75,117.15
Stocks and bonds .....	.....	.....
Stocks in subsidiaries .....	.....	.....
Advances to subsidiaries .....	.....	.....
Real estate for sale .....	.....	.....
Expense in suspense .....	.....	.....
Profit and loss—Special .....	.....	400,000.00
	<u>\$4,919,005.00</u>	<u>\$5,620,090.92</u>

Liabilities:

Overdrafts balances due Brokers, etc...\$	457,545.90	\$ 457,545.90
Notes payable	223,100.00	223,100.00
Trust & agency accounts	2,978,515.16	2,978,515.16
Loans pledged to clients	490,276.00	490,276.00
Merchandise accounts .....	.....	.....
Notes payable—affiliated .....	.....	.....
Income in suspense .....	.....	.....
P. & L. Acct.— operating deficit 2/14/31 .....	.....	(10,149.29)
P. & L. Acct.—operating deficit subsequent to 2/14/31 .....	.....	.....
Surplus & surplus reserves	369,567.94	.....
Reserve for losses .....	.....	680,803.15
Contingent reserve—underwriters .....	.....	400,000.00
Capital stock	400,000.00	400,000.00
	<u>\$4,919,005.00</u>	<u>\$5,620,090.92</u>

EXHIBIT L

Henry Waterhouse Trust Company Balance Sheets

Assets:	As at 12/31/31	As at 12/31/32
Cash	\$ 29,700.69	\$ 14,639.50
Investments .....	.....	.....
Receivables .....	.....	15,214.69
Trust and agency accounts (Shingle & Campbell) .....	.....	.....
Other trust & agency accts.	383,460.67	299,565.32
Loans	2,247,844.14	1,624,740.12
Other assets	17,434.16	17,326.66
Stocks and bonds	251,220.65	267,122.42
Stocks in subsidiaries	303,704.16	303,704.16
Advances to subsidiaries	324,382.60	314,787.92
Real estate for sale	169,700.00	233,273.02
Expense in suspense .....	.....	17,500.00
Profit and Loss—Special	400,000.00	400,000.00
	<u>\$4,127,447.07</u>	<u>\$3,507,873.81</u>
Liabilities:		
Overdrafts balances due Brokers, etc...\$	79,578.59	\$ 46,648.10
Notes payable	376,557.98	674,190.88
Trust & agency accounts	1,834,540.86	1,068,907.28
Loans pledged to clients	198,000.00	132,128.00
Merchandise accounts	1,252.11	.....
Notes payable—affiliated Co.	550,000.00	602,500.00
Income in suspense .....	.....	2,417.13
P. & L. Acct.—operating deficit 2/14/31	(10,149.29)	(10,149.29)
P. & L. Acct.—operating deficit subsequent to 2/14/31	(58,526.56)	(80,062.56)
Surplus & surplus reserves .....	.....	.....
Reserve for losses	356,193.38	271,294.27
Contingent reserve—Underwriters	400,000.00	400,000.00
Capital stock	400,000.00	400,000.00
	<u>\$4,127,447.07</u>	<u>\$3,507,873.81</u>

EXHIBIT M

Henry Waterhouse Trust Company, Limited

P. O. Box 3410

Honolulu, Hawaii

July 18, 1932.

Alexander & Baldwin, Ltd.,

Honolulu, T. H.

Gentlemen:

Under date of February 21, 1931, you loaned to this Company the sum of \$50,000.00 for which we gave you our promissory note repayable upon the terms and conditions set forth in our letter to you of like date.

On February 24, 1931, it was agreed that there should be an Advisory Committee representing your Company and the other corporations and/or individuals (hereinafter called the "Underwriters") who loaned to this Company an aggregate of \$400,000.00, the duties of said Committee being to pass upon various matters of importance, particularly those which might affect the amount of reimbursement ultimately to be made to said Underwriters.

Early in 1932 the Advisory and Finance Committees of this Company decided that it was advisable to reappraise all of its assets; an exhaustive reappraisal disclosed that its liabilities, other than those to the Underwriters and Stockholders, exceeded the value of its assets by a very considerable amount.

Since that time market conditions have become worse. We are now quite confident, and accordingly advise you, that in our opinion the promissory note of \$50,000.00 above referred to is of no value whatever. Despite the worthlessness of the note it remains an apparent liability of this Company and operates as a hindrance to its speedy liquidation, especially as so long as it remains on our books the Advisory Committee will have to be continued. Hence we suggest that you concede the worthlessness of the note by formally authorizing this Company to consider that it is no longer an obligation. We have been informed that, under these circumstances, you may claim said bad debt as a deduction in your income tax return for 1932, provided you write it off your books during said year.

If the foregoing suggestion is approved by all of the "Underwriters" it will no longer be necessary to have an Advisory Committee and we therefore ask that such Committee be abrogated.

Very truly yours,

HENRY WATERHOUSE
TRUST Co., LTD.,

/s/ M. B. Henshaw,
Vice-President.

EXHIBIT N

December 19, 1933

The Bishop Company, Ltd.,
Honolulu, T. H.

Attention: Mr. George P. Rea,
Executive Vice-President

Gentlemen:

It is planned to merge the Guardian, Pacific and Henry Waterhouse trust companies into the Bishop Trust Co., Ltd., for purposes of economy and simplicity of financial structure, under the provisions of Act 169 of the Session Laws of 1931. This plan has been approved unanimously at meetings of the directors of the four companies, and will be submitted to their stockholders respectively at meetings to be held on the 28th instant with a view to completing the merger by the end of the year.

Referring to the notes given to you and others by the Henry Waterhouse Trust Co., Ltd., when that company was taken over by the Bishop Trust Co., Ltd., the payment of which was contingent as therein set forth, and referring also to the letters of the Henry Waterhouse Trust Co., Ltd., to you and such others accompanying those notes and setting forth the agreement entered into at that time;

It is proposed (1), if the holders of said notes so desire, after the merger, to keep earmarked the assets and liabilities of the Henry Waterhouse Trust Co., Ltd., as well as accurate accounts of all amounts

which the Bishop Trust Co., Ltd., shall have theretofore contributed, advanced or loaned to the Henry Waterhouse Trust Co., Ltd., or which it may thereafter contribute or advance toward meeting such liabilities, so as to protect the rights of such holders in case by any possibility there should ultimately be an excess of such assets over such liabilities plus or including such contributions, advances and loans made and to be made by the Bishop Trust Co. and interest thereon, although it now appears to have become certain that, mainly in consequence of the depression, there will be no such excess to apply on account of said notes; said agreement to continue to apply in respect of such assets, liabilities, contributions, advances and loans as if there were no merger except that item “(b) \$1,000 per month to the Bishop Trust Co., Ltd., for overhead or supervision” in paragraph 6 shall not be operative;

Or (2) that such holders, on the theory that such notes have become worthless and to avoid needless expense to the Bishop Trust Co., Ltd., signify their willingness that no such earmarking or accounts be kept after the merger.

A meeting will be held on Thursday, December 21, 1933, at 2:30 P.M. in the Board Room of the Bishop Trust Building at which time and place we shall be pleased to answer any and all questions and to give you any information which you may desire respecting the above matters.

Thereafter we will appreciate it if you will inform

up whether or not proposal (2) is acceptable to you or, if not, whether you approve of proposal (1).

Very truly yours,

HENRY WATERHOUSE
TRUST CO., LIMITED,

M. B. Henshaw,
Vice-President.

[Title District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause consists of the following listed original pleadings in said cause as requested in Appellant's Designation of Record, save and except that portion of the transcript of proceedings and the exhibit marked "American Factors Exhibit No. "P-13" listed in items 6 and 7 respectively of said Designation of Record:

Complaint.

Answer.

Motion to Amend Complaint and Notice of Hearing on Motion.

Order Granting Motion to Amend Complaint.

Motion to Substitute Executrix as Defendant with Consent of Executrix.

Findings of Fact and Conclusions of Law.

Judgment.

Certificate of Probable Cause.

Notice of Appeal.

Bond for Costs on Appeal.

Designation of Record.

Designation of Record.

Alexander & Baldwin Exhibit "A."

I further certify that included in said record on appeal is a true and correct copy of the joint Decision rendered and of record in Civil No. 419 and Civil No. 474 of this court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of March, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Endorsed]: No. 12500. United States Court of Appeals for the Ninth Circuit. Alexander & Baldwin, Limited, a Corporation, Appellant, vs. Agnes M. Kanne, Executrix under the will and of the Estate of Fred H. Kanne, Collector of Internal Revenue of the United States for the District of Hawaii, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed March 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12500

ALEXANDER & BALDWIN, LIMITED, a Hawaiian Corporation,

Appellant,

vs.

AGNES M. KANNE, Executrix under the Will and of the Estate of Fred H. Kanne, Collector of Internal Revenue of the United States for the District of Hawaii,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL.

The points upon which Alexander & Baldwin, Limited, plaintiff and appellant in the above entitled cause, intends to rely on this appeal are as follows:

1. The District Court erred in concluding that the payment in 1931 by the plaintiff of \$50,000.00 to Henry Waterhouse Trust Company, Limited, was just a contribution.

2. The District Court erred in concluding that the note for \$50,000.00 given by Henry Waterhouse Trust Company, Limited in 1931 was contingent in payment and was subject to such conditions as

to render it non-negotiable and in concluding that the note was without any negotiable value at the time it was made and at all times thereafter.

3. The District Court erred in concluding that the note given by Henry Waterhouse Trust Company, Limited, to the plaintiff in 1931 could not be dealt with as a debt.

4. The District Court erred in concluding that the contingencies as to payment and/or the lack of negotiable value prevented said note from being an evidence of debt.

5. The District Court erred in concluding that the Commissioner of Internal Revenue did not err in disallowing plaintiff a deduction therefor as a bad debt in computing its taxable net income for the calendar year 1932.

6. The District Court erred in concluding that no part of the payment of \$50,000.00 made to Henry Waterhouse Trust Company, Limited, in 1931 by plaintiff was deductible as a bad debt ascertained to be worthless and charged off within the tax year 1932 or a loss sustained during that taxable year.

7. The District Court erred in failing to render judgment in favor of plaintiff on account of plaintiff's overpayment of income tax for the year 1932 for the amount of \$8,488.63 with interest thereon instead of the amount of \$137.50 with interest thereon in the amount of \$28.94.

Dated: Honolulu, T. H., this 2nd day of March, 1950.

ALEXANDER & BALDWIN,
LIMITED,

By /s/ C. DUDLEY PRATT,

By /s/ VERNON O. BORTZ,

Its Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed Mar. 13, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED.

Alexander & Baldwin, Limited, appellant in the above-entitled cause, hereby designates for printing the following portions of the record on appeal:

1. Complaint.
2. Defendant's Answer to Complaint.
3. Plaintiff's Motion to Amend Complaint.
4. Order Granting Motion to Amend Complaint.
5. Motion to Substitute Executrix as Defendant with Consent of Executrix.
6. Pages 3 to 5, inclusive, and pages 211 to 400, inclusive, of transcript of testimony, including that portion of the testimony of S. M. Lowrey beginning at page 241 and all of the testimony of T. G. Singlehurst, E. J. Greaney, A. L. Castle, A. L. Dean and C. R. Linden.

7. American Factors, Limited Exhibit No. "P-13" and Alexander & Baldwin, Limited, Exhibit "A."

8. Opinion of the Court filed on March 18, 1948.

9. Findings of Fact and Conclusions of Law filed December 7, 1949.

10. Judgment.

11. Certificate of Probable Cause.

12. Notice of Appeal.

13. Statement of Points Upon Which Appellant Intends to Rely on Appeal.

14. Docket Entries.

15. Designation of Record.

Dated: Honolulu, T. H., this 10th day of March, 1950.

ALEXANDER & BALDWIN,
LIMITED,

By /s/ C. DUDLEY PRATT,

By/s/ VERNON O. BORTZ,

Its Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed Mar. 13, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION

It Is Hereby Stipulated by and between the parties hereto that this application be made to the Court for an order relieving the appellant from printing or reproducing item No. 6 and Exhibit No. P-13 of item No. 7 of the Designation of Portions of Record to be Printed filed by the appellant herein.

The application to relieve said appellant from printing item No. 6 aforesaid is made because this matter has already been printed in case No. 12,391, *Kanne v. American Factors*, now pending on the calendar of the Court.

The application concerning Exhibit P-13 of item No. 7 is made to the Court because the cost of reproduction of this exhibit is prohibitive.

It is requested, therefore, that the Court consider said item No. 6 from the record printed in said case No. 12,391 and that the Court consider said Exhibit P-13 in its original form without reproduction.

This application is based on the record filed herein and the affidavit of Vernon O. Bortz, one of the attorneys for Alexander & Baldwin, Limited, attached hereto.

Dated: Honolulu, T. H., this 24th day of March,
1950.

ALEXANDER & BALDWIN,
LIMITED,

By /s/ C. DUDLEY PRATT,

By /s/ VERNON O. BORTZ,

Its Attorneys.

RAY J. O'BRIEN,

United States Attorney,

District of Hawaii,

/s/ RAY J. O'BRIEN.

Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

United States Circuit Judge.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF ATTORNEY

Territory of Hawaii,
City and County of Honolulu—ss.

Vernon O. Bortz, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for Alexander & Baldwin, Limited, appellant herein, and that he makes this affidavit in support of an application for an order of the Court relieving the parties hereto from printing or reproducing item No. 6 and Exhibit P-13 of item No. 7 of Appellant's Designation of Portions of Record to be Printed; that item No. 6 has already been printed in case No. 12,319, Kanne v. American Factors, now pending on the calendar of the Court; that the cost of reproducing Exhibit P-13 is prohibitive; that it is necessary that said exhibits be considered by the Court in its determination of this cause.

Further affiant sayeth not.

Dated: Honolulu, T. H., this 24th day of March, 1950.

/s/ VERNON O. BORTZ,

Subscribed and sworn to before me this 24th day of March, 1950.

[Seal] /s/ MAIZIE M. JOINER,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My Commission Expires Jan. 19, 1952.

[Endorsed]: Filed Mar. 28, 1950.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALEXANDER & BALDWIN, LIMITED,
Appellant,
vs.

AGNES M. KANNE, Executrix under the
Will and of the Estate of Fred H. Kanne,
Collector of Internal Revenue of the
United States for the District of Hawaii.
Appellee.

Upon Appeal from the United States District Court
District of Hawaii

BRIEF FOR APPELLANT
ALEXANDER & BALDWIN, LIMITED

C. DUDLEY PRATT
VERNON O. BORTZ
Attorneys for Appellant
Alexander & Baldwin, Limited.

Of Counsel:

PRATT, TAVARES & CASSIDY
Alexander & Baldwin Building
Honolulu, T. H.

FILED

JUN 29 1950

PAUL P. O'BRIEN,

CLERK

SUBJECT INDEX

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALEXANDER & BALDWIN, LIMITED,
Appellant,

vs.

AGNES M. KANNE, Executrix under the
Will and of the Estate of Fred H. Kanne,
Collector of Internal Revenue of the
United States for the District of Hawaii.
Appellee.

Upon Appeal from the United States District Court
District of Hawaii

BRIEF FOR APPELLANT
ALEXANDER & BALDWIN, LIMITED

OPINION BELOW

The Opinion of the District Court (R. 14-21) is reported
at 76 F. Supp. 133.

STATEMENT OF THE PLEADINGS AND THE FACTS

This is an appeal by Alexander & Baldwin, Limited, plaintiff-appellant against Fred H. Kanne, Collector of Internal Revenue for the United States for the District of Hawaii, defendant. The suit was brought in the United States District Court for the District of Hawaii on July 21, 1942, to recover income taxes and interest thereon for the calendar year 1932 alleged to have been erroneously and illegally exacted from plaintiff by the said Fred H. Kanne (R. 2-7). An Answer was filed by the defendant on October 17, 1942 (R. 7-9). On October 28, 1943, plaintiff filed a Motion to Amend Complaint (R. 9-10) and an Order Granting Motion to Amend (R. 11) was entered on November 3, 1943. Subsequently, defendant Kanne died and his executrix Agnes M. Kanne was substituted as defendant by Order of Court (R. 13).

Jurisdiction of the District Court was invoked under 28 U.S.C. Sec. 41 (5), now 28 U.S.C. Sec. 1340. The judgment of the District Court was entered on December 7, 1949 (R. 47-48) pursuant to the Opinion of the Court filed on November 18, 1948 (R. 14-21) and Findings of Fact and Conclusions of Law filed on December 7, 1949 (R. 22-46). Alexander & Baldwin, Limited filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on February 2, 1950 (R. 50). The jurisdiction of this Court is invoked under the provisions of Section 128 of the Judicial Code, as amended, now 28 U.S.C. Sec. 1291.

STATEMENT OF CASE

Alexander & Baldwin, Limited, plaintiff-appellant, (hereinafter called Alexander & Baldwin) is a Hawaiian corporation having its principal office in Honolulu, Territory of Hawaii. Alexander & Baldwin for the purpose of comput-

ing its Federal Income Taxes is and has been at all times on the calendar year and cash basis and follows the actual method of charging off bad debts (R. 71).

In its Federal Income Tax Return for the taxable year 1932, Alexander & Baldwin deducted the amount of \$50,000.00 on account of a bad debt of Henry Waterhouse Trust Company, Limited, written off during the year 1932 (R.72). The Commissioner of Internal Revenue disallowed the bad debt deduction and assessed additional income taxes on account thereof which Alexander & Baldwin paid to defendant Kanne upon demand. The District Court in its decision upheld the Commissioner of Internal Revenue and disallowed the deduction of the bad debt of Henry Waterhouse Trust Company, Limited.

In 1932 Alexander & Baldwin was the agent for five companies operating sugar plantations, three companies operating pineapple plantations, two ranches and two railroad and stevedoring companies, with a total net worth of \$49,293,366.00. In the same year, Alexander & Baldwin's investment in the securities of the companies for which it acted as agent or factor amounted to over \$11,000,000.00. In addition, Alexander & Baldwin, the plaintiff herein, had other investments including an investment of \$1,250,000. in its home office building in Honolulu, Territory of Hawaii. On December 30, 1930, Alexander & Baldwin and the companies for which it served as agent or factor had on deposit in the banks of the Territory of Hawaii at least a total sum of \$2,275,000.00 (R. 55-56).

The Henry Waterhouse Trust Company, Limited, hereinafter called Waterhouse Company, was incorporated under the laws of the Territory of Hawaii. In the middle of October, 1930, Waterhouse Company increased its capital stock from \$200,000 to \$400,000, consisting of 4,000 shares of a par value of \$100 each. The new shares were all taken by the old stockholders who paid for them in cash at par.

In November, the effects of the general business depression began to be felt in the Territory of Hawaii, and as a large part of the Waterhouse Company assets consisted of real estate and mortgages, its secretary became apprehensive that if many calls were made on its demand accounts the Company's financial condition would not be sufficiently liquid to meet its cash requirements. He discussed the situation with the treasurer and auditor of Waterhouse Company and then advised the management of Bishop Trust Company, Limited, hereinafter called Bishop Trust, that a sale of the stock might be arranged, suggesting a price of \$100 each or more for the shares.

In November, 1930, Mr. A. W. T. Bottomley, president of two large Hawaiian corporations and vice-president and director of Bishop Trust, called Mr. E. J. Greaney, an auditor, to his office and requested him to make a confidential examination of the books and accounts of Waterhouse Company¹ (Am. Fac. R. 488). Mr. Greaney entered upon the audit and in connection with this work made an exhaustive appraisal of the value of the various receivables of the Waterhouse Company (Am. Fac. R. 489-492, 499-500, 502-505).

Mr. A. W. T. Bottomley, president of American Factors, Limited, and of the Bishop First National Bank of Honolulu and vice-president of the Bishop Trust Company, called a conference of the heads of the four Hawaiian sugar agencies including appellant, the president of the Bank of Hawaii, Limited, the president of the Hawaiian Trust Company, Limited, and two members of the finance committee of the

¹ By order of this Court (R. 100) pursuant to a stipulation entered into by and between counsel (R. 99), the Court agreed to consider the testimony of the appellant's witnesses from the record heretofore printed in Case No. 12391, *Kanne v. American Factors*, now pending on the calendar of this Court. When reference is made to appellant's record, the designation R. followed by the page number will be used and when reference is made to the record in Case No. 12391, the designation Am. Fac. R. will be used.

Bishop Trust Company, Limited, to present to them the financial condition of the Waterhouse Company and discuss the feasibility of making some plan to prevent the Waterhouse Company from being forced into liquidation.

The Waterhouse Company was conducting business as usual but was encountering some financial difficulties. After the investigation, the executives of the Bishop Trust Company, Limited, wished to look further into the matter before acting. About February 1, 1931, the Bishop Trust Company, Limited, advised the Waterhouse Company shareholders that it would not pay cash for their shares.

On Saturday, February 14, 1931, the president of Bishop Trust at a meeting of the Board of Directors of that company made a statement which was recorded in the minutes (Am. Fac. R. 380-382). In brief, it was proposed that Bishop Trust acquire the stock of Waterhouse Company without cost; that Mr. and Mrs. R. W. Shingle in order to settle their indebtedness to the Waterhouse Company pay the amount of \$535,000, and convey their respective 18% and 10% undivided interests in certain lands which were to be sold for \$87,000; and the proceeds, together with \$13,000 in addition, were to be contributed by Bishop Trust to make an even \$100,000 to be paid into Waterhouse Company (Am. Fac. R. 380-382).

In addition, a number of corporations and individuals were to loan various sums aggregating \$400,000 and to receive notes therefor (Ex. A, R. 62), thus making a total of \$1,035,000 cash to be paid into Waterhouse Company. Bishop Trust was to pay such an amount, if any, as was required in addition to enable the Waterhouse Company to meet its liabilities. Bishop Trust was to take over without further cost the business of Waterhouse Company (other than assets and liabilities) and to operate such business at its own expense and for its own benefit (Am. Fac. R. 380-382). Under the plan, the assets were to be liquidated and

the liabilities paid and in final settlement, if there was an excess of assets over liabilities, such excess was to be applied first to the reimbursement of the amount contributed by Bishop Trust, if any, in addition to the said \$1,035,000 and secondly, to the lenders of the \$400,000 with interest at 4%, and thirdly, the remainder, if any, was to go to Bishop Trust (Am. Fac. R. 382). The plan as outlined was approved by the Board of Directors of Bishop Trust at the meeting held on February 14, 1931. Prior to the consummation of the plan hereinabove mentioned the several individuals and corporations promised to pay to Waterhouse Company, upon the consummation of the proposed plan, sums of money aggregating \$400,000, of which amount appellant agreed to pay the amount of Fifty Thousand Dollars (\$50,000) (Am. Fac. R. 62).

The plan of reorganization of Waterhouse Company was carried out as outlined above and the several individuals and corporations paid into the Waterhouse Company the amounts of money aggregating \$400,000. On February 25, 1931, the Board of Directors of Alexander & Baldwin authorized the payment of \$50,000 to the Waterhouse Company (Ex. B, R. 76). Alexander & Baldwin and each of the persons and corporations lending money to the Bishop Trust under the agreement received notes which were identical in form. A copy of the note delivered to Alexander & Baldwin is shown in Exhibit J (R. 86).

An advisory committee of the lenders was appointed to pass upon the program of liquidation, the members of the advisory committee being shown at R. 67. This committee met frequently with the finance committee of the Waterhouse Company and passed upon all matters of importance, particularly those matters tending to affect the amount of reimbursement, if any, ultimately to be made to the special note owners (R. 68).

Under the date of July 18, 1932, Waterhouse Company, dispatched to the appellant, a letter signed by M. B. Henshaw (a true copy of which is marked Exhibit M and shown at R. 89) stating that early in 1932 the advisory and finance committees of Waterhouse Company decided that it was advisable to reappraise the assets and that such reappraisal disclosed that its liabilities other than that to the lenders and stockholders exceeded the value of the assets by a very considerable amount and advised them that the note had now become worthless (R. 89-90).

Mr. Carl R. Linden, employed as a tax advisor for appellant, testified that in the year 1932 he reviewed the note received by Alexander & Baldwin with Mr. Sherwood Lowrey, treasurer of American Factors, Limited, a holder of a similar note. Mr. Linden indicated that Mr. Lowrey was firmly of the opinion that there was no possibility of any recovery being made on the note (Am. Fac. R. 543). The witness testified further that he also discussed the matter with Mr. John Waterhouse, President and General Manager of Alexander & Baldwin, the latter also expressing the opinion that there was no possibility of any recovery on the note (Am. Fac. R. 543). As a result, officers of appellant reached the conclusion that the note was valueless and accordingly it was written off and claimed as a tax deduction for the year 1932 (Am. Fac. R. 543-544).

QUESTION INVOLVED

(1) Is Alexander & Baldwin, Limited, entitled to a deduction of the amount of \$50,000 advanced to it by Waterhouse Company and charged off as worthless in the year 1932, as a bad debt or as an ordinary or necessary expense of carrying on its business in the year 1932 in the computation of its Federal income tax liability for the year 1932?

SPECIFICATION OF ERRORS RELIED ON

The United States District Court for the District of Hawaii erred:

1. In concluding that the payment in 1931 by the plaintiff of \$50,000.00 to Henry Waterhouse Trust Company, Limited, was just a contribution.

2. In concluding that the note for \$50,000.00 given by Henry Waterhouse Trust Company, Limited in 1931 was contingent in value and was subject to such conditions as to render it non-negotiable and in concluding that the note was without any negotiable value at the time it was made and at all times thereafter.

3. In concluding that the note given by Henry Waterhouse Trust Company, Limited, to the plaintiff in 1931 could not be dealt with as a debt.

4. In concluding that the contingencies as to value and/or the lack of negotiable value prevented said note from being an evidence of debt.

5. In concluding that the Commissioner of Internal Revenue did not err in disallowing plaintiff a deduction therefor as a bad debt in computing its taxable net income for the calendar year 1932.

6. In concluding that no part of the payment of \$50,000.00 made to Henry Waterhouse Trust Company, Limited, in 1931 by plaintiff was deductible as a bad debt ascertained to be worthless and charged off within the tax year 1932 or as an ordinary or necessary expense of carrying on its business for the year 1932.

7. In failing to render judgment in favor of plaintiff on account of plaintiff's overpayment of income tax for the year 1932 for the amount of \$8,488.63 with interest thereon instead of the amount of \$137.50 with interest thereon in the amount of \$28.94.

SUMMARY OF ARGUMENT

THE COURT ERRED IN DISALLOWING ALEXANDER & BALDWIN, LIMITED, THE DEDUCTION OF THE PAYMENT OF \$50,000 TO WATERHOUSE COMPANY IN 1931 IN COMPUTING ITS TAXABLE NET INCOME FOR THE CALENDAR YEAR 1932.

1. The sum of \$50,000 representing the amount paid to Waterhouse Company in 1931 was deductible as a bad debt determined to be worthless and charged off in the tax year 1932.

The payment of \$50,000 made by Alexander & Baldwin to Waterhouse Company in 1931 constituted a loan which was to be repaid from the liquidation of the assets of Waterhouse Company. The evidence adduced in the Trial Court clearly shows that the payment was in no sense a gift or contribution but on the contrary was a loan made with a reasonable expectation of repayment. It was only when the effects of the depression became more pronounced in Hawaii that the note was ascertained to be worthless and charged off in the year 1932.

2. In the alternative, if not deductible as a bad debt the sum of \$50,000 representing the amount paid to Waterhouse Company in 1931 was deductible as an ordinary and necessary business expense of Alexander & Baldwin, Limited, in the year 1932.

The payment of \$50,000 made by Alexander & Baldwin to Waterhouse Company in 1931 in substance and reality was an expense incurred by Alexander & Baldwin in an effort to protect its vital interests in the community. There is ample evidence in the record to show that Alexander & Baldwin would have suffered a direct loss if the Waterhouse Company had failed. The advancement of funds under

similar circumstances during the critical early "thirties" constituted an expenditure which the Courts have held to be deductible as both an "ordinary and necessary" business expense.

ARGUMENT

I.

THE COURT ERRED IN DISALLOWING ALEXANDER & BALDWIN, LIMITED, THE DEDUCTION OF THE PAYMENT OF \$50,000 TO WATERHOUSE COMPANY IN 1931 IN COMPUTING ITS TAXABLE NET INCOME FOR THE CALENDAR YEAR 1932.

1. The sum of \$50,000 representing the amount paid to Waterhouse Company in 1931 was deductible as a bad debt determined to be worthless and charged off in the tax year 1932.

Section 23 of the Revenue Act of 1932 pertaining to the deduction of bad debts is as follows: "(j) Bad Debts.—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction."

The District Court in its opinion (R. 20) holds that the payment of \$50,000 made by the appellant to the Waterhouse Company was "just a contribution." The Court remarks further that "The note given in acknowledgment of the contribution was contingent as to value upon such conditions as to give it no negotiable value from the time it was made. It could not be dealt with as a debt. The considerations in payment for the contribution flowed to the payee of the note at the time it was made—the protection of the commercial community, sympathy toward Water-

house Company clients who could ill afford to lose, and other commendable desires and motives of helpfulness and security, but there was no attempt to show that either American Factors or Alexander & Baldwin would have suffered any material loss had they not attempted to keep the Waterhouse Trust Company a going concern.

"I find that no part of this contribution was deductible as a bad debt or loss in 1932 or at any other time, since it never was a collectible debt, but was from the beginning in the nature of a contingent or speculative gift, to which status it speedily resolved itself with certainty, although it may have accomplished in part the purpose for which it was intended, that is, prolonged the life of Waterhouse Trust Company. Claim for tax refund on this outgoing sum of \$50,000 is denied" (R. 20).

In brief, the District Court held (1) that the payment of \$50,000 made by appellant to the Waterhouse Company was a contribution in the nature of a contingent or speculative gift; (2) that the note received by appellant was contingent as to value upon such conditions so that it had no negotiable value (Finding of Facts No. XIII, R. 40); (3) that the consideration for the contribution included the protection of the commercial community, sympathy for clients of Waterhouse Company and other commendable desires and motives of helpfulness and security (Finding of Facts No. XIII, R. 40); (4) there was no attempt to show that Alexander & Baldwin would have suffered any material loss had it not attempted to keep Waterhouse Company a going concern (Finding of Facts No. XIII, R. 40); (5) that there never was a collectible debt but merely a contingent or speculative gift, even though it may have accomplished in part the purpose of prolonging the life of Waterhouse Company. It is submitted to the Court that Finding of Fact No. XIII which incorporates the findings of the Court set forth in the opinion is not in accord with the facts set

forth in the stipulation between the parties (R. 54), nor with the evidence adduced upon the trial of this cause.

First, we will consider the several factors which clearly indicate the error of the Court's finding that the payment of appellant constituted a contribution or gift. The Appellate Court's attention is directed to the complex and involved nature of the plan under which the payment of the funds was made (Finding of Fact No. IX, R. 28). Note, for example, the requirement that Bishop Trust Company was to keep separate accounting records of the assets of Waterhouse Company, which records were to be made available to the several note holders (R. 30-32). The provision for an advisory committee for the note holders also argues strongly against the finding that the payment in question represented a gift. It is submitted to the Court that experienced businessmen would hardly be likely to set up such a comprehensive and elaborate plan unless there was at least a reasonable expectation of repayment.

A further cogent argument against the validity of the Court's finding is found in the testimony of several of appellant's witnesses on the trial of this cause. Mr. Sherwood Lowrey, treasurer of American Factors (which company was also a note holder), testified that executives of American Factors believed there was a reasonable expectation that the note would be paid (Am. Fac. R. 474). Mr. Lowrey testified further that at the end of 1931, the note together with other receivables was reviewed by Company officials and at that time American Factors considered the note as good (Am. Fac. R. 466-467).

Mr. A. L. Castle, who represented his father in connection with the loan made by the latter to the Waterhouse Company, testified that the payment was made to the Waterhouse Company "on a loan basis" (Am. Fac. R. 511).

Mr. Arthur L. Dean, a director of appellant, testified that although the loan which appellant made to Waterhouse

Company could not be considered as an investment, the company did expect to receive all or a part of the money loaned; that although the lender appreciated the risk which was being taken, it expected to receive the money back on the loan (Am. Fac. R. 532-533).

Mr. Edward J. Greaney, a certified public accountant, testified that he was asked to evaluate and did evaluate the assets of the Waterhouse Company as of January 31, 1931 (Am. Fac. R. 487-490). Mr. Greaney testified further that the sum of \$260,000 was added as a cushion to take care of losses over and above those shown on the schedule (Am. Fac. R. 497-498). It was the opinion of Mr. Greaney that inasmuch as the value of the Waterhouse Company assets as reflected in various summaries prepared in connection with the audit exceeded the liabilities, the company was not insolvent (Am. Fac. R. 505-506).

The report of the Bank Examiner of the Territory of Hawaii indicates that subsequent to February 14, 1931, shortly after the Waterhouse Company was taken over by the Bishop Trust Company, sufficient assets appeared to be on hand to meet the liabilities of Waterhouse Company (Am. Fac. R. 554).

It is clear from the evidence adduced upon the trial of this cause that the payment made by appellant can in no sense be considered as a contribution. Not only was there no testimony to that effect by witnesses for either party, but on the contrary, appellant's witnesses testified directly that repayment was expected. In view of such evidence, the conclusion of the Trial Court that payment was just a contribution is clearly erroneous.

The Court also erred in finding that the note was contingent as to value and that it contained conditions which gave it no negotiable value (Finding of Fact No. XIII, R. 40). Under the provisions of the plan, the assets of Waterhouse Company were to be liquidated and after the payment

of liabilities a certain amount of the funds was to be paid first to Bishop Trust with the remainder then to be applied in payment of the notes. However, the fact that payment to the note holders was contingent in this respect does not support the finding of the Court that the note was contingent as to value. It may be true that the value of the note is less because it is payable only out of a particular fund, but that does not mean that the note possesses no value. The evidence indicated above shows clearly that appellant and other lenders loaned the funds upon a reasonable expectation of repayment and believed the note to have value at the time the loan was made. Moreover, the fact that a note is non-negotiable and thus transferable only by assignment may have the effect of rendering it less valuable but this should not be interpreted to mean that it is wholly without value.

In *Clay Drilling Company of Texas v. Commissioner of Internal Revenue*, 6 T.C. 324, the question presented to the Court was whether petitioner was entitled to a bad debt deduction aggregating \$13,946.98. The latter sum was made up of two accounts representing debts owed by two individuals to petitioner's predecessor company. The Commissioner took the position that these two accounts did not represent "debts" which were due petitioner at the time they were charged off within the meaning of the statute and applicable regulations. The Commissioner contended that by virtue of a contract entered into with the debtors, the indebtedness to the corporation was canceled and forgiven. It was further contended that the contract provided a method for the debtors to pay said indebtedness by means of commissions on certain drilling contracts which were to be tendered to the corporation by the debtors and that the amount of the indebtedness was to be payable only as set forth in the contract and was not to be construed as a personal obligation to the debtors.

The Court held, however, that the debts were not canceled or forgiven by the terms of the contract entered into between the parties. In the course of its opinion, the Court remarked as follows:

“It seems to us that the debts of the Herschbachs to petitioner continued to exist, payable, it is true, only in the manner agreed upon. We know of no law which is to the effect that a debt is canceled and forgiven merely because the manner of its payment is restricted and it is agreed that the debtor shall not be personally liable if the debt is not fully paid in that manner. . . .

“Along somewhat the same line of reasoning, we think it is reasonable to hold that these accounts due by the Herschbachs to petitioner continued to be debts or obligations owed by the Herschbachs to petitioner, even though payable only in a special way and not out of the debtor’s ‘general funds,’ so to speak. We therefore sustain petitioner on this phase of the issue. . . .”

In *Western Woodwork & Lumber Company v. Commissioner*, 6 T.C.M. 504, taxpayer’s president owned a lot and proposed to a building contractor that the latter build a house thereon. An arrangement was entered into whereby the contractor agreed to build the house and when the house was sold taxpayer’s president was to be reimbursed in an agreed amount for the lot. The agreement provided further that taxpayer was to furnish the lumber and mill work and that the builder’s liability would be limited to paying taxpayer the agreed amount for lumber and millwork from the proceeds of the sale of the house. In 1929, after the completion of the house taxpayer received a note from the builder for lumber and millwork upon the further agreement that the latter would not be liable on the note except to pay the same out of funds received from the sale of the house. The builder attempted to sell the property but failed to do so until January, 1943. In 1935 the builder informed

taxpayer that he was ready to disclaim all hope of profit in the house and offered to deed the same to taxpayer free and clear. Taxpayer rejected this offer because the house with its mortgage was considered a liability rather than an asset. Taxpayer claimed a loss in 1943 when the house was sold. The claim was disallowed by Commissioner. The Tax Court upheld the Commissioner, not on the grounds that no debtor-creditor relationship existed because taxpayer had only a contingent claim as contended by Commissioner but because the worthlessness of the bad debt was established in 1935.

This case supports the contention of appellant that the mere fact that a fund from which a note is payable may prove insufficient to make the payment does not deprive the note of its character as a debt subject to being charged off and deducted as a bad debt when it becomes worthless.

The finding of the Court relative to the considerations for making the loan, i.e. the protection of the commercial community, sympathy toward clients of Waterhouse Company and other commendable desires and motives for helpfulness and security has no bearing on the deductibility of the loan. The law is well settled that the motives of the taxpayer in making a loan are immaterial in determining whether or not he is entitled to a deduction as a bad debt. See *Cooper-Brannan Naval Stores Co. v. Commissioner of Internal Revenue*, 9 BTA 105, 108.

Nor will a deduction as a bad debt be denied because the loan is not a "wise" loan. In *Austin v. Helvering*, 77 F. 2d 373 (1935), it was held that losses on injudicious loans made by bank officers were deductible as bad debts ascertained to be worthless and charged off within the taxable year. In *Redfield v. Eaton*, 53 F. 2d 693, plaintiff made certain advances of money to an actress who was then unemployed, upon the understanding that the actress would repay the loan as soon as she could get a job. The Court

held that the transaction constituted a bona fide loan even though an injudicious one and allowed the plaintiff to charge it off as a bad debt.

The record clearly shows that the note in question was ascertained to be worthless in the year 1932 and that appellant acted in good faith in making that ascertainment and charging it off as a bad debt.

Mr. Sherwood Lowrey testified that at the end of 1932 after discussing the matter with executives of American Factors, Limited (one of the other lenders), the conclusion was reached that the note was valueless and it was charged off on the books of the company (Am. Fac. R. 469-471). Mr. Carl Linden, employed as tax advisor by appellant, testified that after a discussion with executives of appellant and others, the conclusion was reached that there was no possibility of recovery on the note and that it should be charged off (Am. Fac. R. 543).

Alfred L. Castle also testified that he had made a study of the value of the note at the end of 1932 and had also concluded that the note was worthless and should be written off (Am. Fac. R. 512-515).

The Court's attention is also directed to the excerpt from the Bank Examiner's report in connection with the condition of Waterhouse Company at the close of business on December 31, 1932 to the effect that "an analysis of the various asset and liability accounts of the company made by us at December 31, 1932 disclosed according to our figures an insufficient amount of assets to meet the remaining liabilities" (Am. Fac. R. 554).

It is submitted to the Court that the note in question became worthless in 1932; that appellant did in fact ascertain the debt to be worthless in that year; that appellant acted in good faith in ascertaining the debt to be worthless in such taxable year; that the note was charged off as a bad debt in that year and that the deduction therefore is a proper

one which should be allowed in the computation of the income tax liability of Alexander & Baldwin, Limited, for the calendar year 1932.

2. In the alternative, if not deductible as a bad debt, the sum of \$50,000.00 representing the amount paid to Waterhouse Company in 1931 was deductible as an ordinary and necessary business expense of Alexander & Baldwin, Limited in the year 1932.

Section 23 of the Revenue Act of 1932 providing for the deduction of ordinary and necessary expenses is as follows: "a. Expenses—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

In the event this Court should deny the deduction of the said amount of \$50,000.00 as a bad debt ascertained to be worthless and charged off in the taxable year 1932, a deduction of \$50,000.00 should be allowed appellant as an ordinary and necessary expense occurring in its business during the taxable year 1932.

The only finding by the Court relative to the deduction of the amount of \$50,000.00 as an ordinary and necessary business expense was to the effect that there was no attempt to show that appellant would have suffered any material loss had it not attempted to keep Waterhouse Company a going concern (R. 20). It is respectfully submitted to the Court that the record in this case indicates that the Court erred in making such a finding.

Mr. Sherwood Lowrey testified that it would be disastrous to the community as a whole should the Waterhouse Company fail (Am. Fac. R. 465) and also that it was to the best interests of the company that the Waterhouse Company be assisted by the amount of the loan (Am. Fac. R. 474).

Mr. Dean, a director of Alexander & Baldwin, Limited, testified that one of the considerations for the making of the loan was the maintenance of the integrity and stability of the basic business enterprises of the Territory; that this is a small, isolated and closely knit community; that it would be a major disaster, the ramifications of which could not be foreseen, if one of the trust companies were unable to meet its obligations (Am. Fac. R. 527).

In the case of *St. Louis Union Trust Company v. Sheehan* (D.C., E.D.Mo., 40-2 USTC 9585, 1940), one of the large banks in taxpayer's community was in danger of failure on account of runs. The taxpayer in this case was a trust company with very large sums of money on deposit in the First National Bank and it owned approximately one-third of the stock in that bank. After many of the citizens of St. Louis, including the taxpayer, decided that it was in their best interests for the business of the failing bank to be taken over by the First National Bank, a guaranty plan was devised to insure that the First National Bank would not sustain any loss by reason of their assumption of the liabilities of the bank which was in danger of failure. The guaranty in this case was not intended to add anything to the value of the assets of the First National Bank nor was there any thought of acquiring any additional business out of the transaction. The court held therefore that it could not be regarded in any sense as a capital expenditure.

As the court said: "The purpose of the taxpayer in executing its guaranty was to induce the First National Bank to take over the assets and liabilities of the failing institution, and thus remove from the business community the detrimental effects of a major bank failure. If the guaranty had not been made, the First National Bank would have refused to take over the failing bank. It was to induce it to do so that the taxpayer, along with other business concerns, participated in the guaranty."

The court held that taxpayer's contribution to the fund in 1931 was deductible as an ordinary and necessary business expense in the year 1936 because as the court said: "The amount of the loss under the guaranty was first definitely ascertainable in 1936, and it was then paid by the taxpayer."

In *Robert Gaylord, Inc. v. Commissioner* (41 B.T.A., 1119, 1940) the taxpayer corporation and a number of other business firms and individuals in 1931, signed an instrument of guaranty and deposited with the First National Bank in St. Louis the sum of \$2,000,000.00 to induce it to take over the assets and assume the liabilities of the Franklin-American Trust Company which was on the verge of being closed because of its inability to withstand a run.

The petitioner was a Missouri corporation engaged in the business of manufacturing. It was not a stockholder or a depositor in the Franklin-American Bank. It was induced to subscribe to the instrument of guaranty solely because it believed it was for the best interests of the corporation. At a meeting held on December 21, 1931, which was attended by officers and representatives of banks, corporations and other businesses, the president of the St. Louis Clearing House Association informed the businessmen that the general banking situation was acute; that Franklin-American would be unable to open the following morning unless the guaranty were executed; that if it were allowed to fail, it would seriously affect all business, industry, and banking in the city. The board found that the petitioner signed the guaranty because of the belief that the failure of the Franklin-American Trust Company would jeopardize its bank accounts and accounts receivable in and near St. Louis, would paralyze its current business, particularly the Christmas trade, and in addition would cut down its prospective orders and future business.

The transaction was consummated and a loss of \$12,451.58 was sustained by the petitioner. In the year 1936 the tax-

payer took this amount as a deduction from the gross income. The claimed deduction was disallowed by the Commissioner.

The petition filed by the taxpayer alleges that the deduction should be allowed as a loss under Section 23 (a) as an ordinary and necessary expense paid or incurred during the taxable year in carrying on a trade or business; under Section 23 (f) as a loss not compensated for by insurance; under 23 (q) as a contribution; or under 23 (k) as a bad debt. The Commissioner contended that the deduction was not allowable under any of the sections referred to above. It was his position that petitioner merely made a voluntary contribution; that it participated in the "rescue party" purely as a "matter of civic pride."

The Board of Tax Appeals held that the expenditure constituted an "ordinary and necessary" business expense within the purview of Section 23 (a). The Board said:

"That the expenditure in question was deemed by the taxpayer to be necessary for the protection of its own business cannot be doubted. The fact that it had no direct financial stake in the Franklin-American Bank is not determinative. The effect of the failure of this bank upon petitioner's business might well have been considerable. As pointed out by its president, it stood to lose upwards of a quarter of a million dollars through the collapse of the financial institutions of the community, which at that time was imminent. If the guaranty had not been raised and the apprehended collapse had occurred, it is entirely possible that petitioner's business would have been wiped out. This must have been in the minds of the officers and directors of petitioner when they authorized the agreement to be signed and the amount to be deposited. We think it must be held, therefore, that the expenditure was a 'necessary' one."

The Board had more difficulty in determining that the expenditure was "ordinary" as well as "necessary." The

Board pointed out that in *Welch v. Helvering*, (290 U.S. 111, 78 L. Ed. 212, 1933), the Supreme Court said: "What is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. . . . It is the kind of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling."

The Board in holding that the transaction here was the "common and accepted means of defense" adopted by corporate businesses generally when faced with a situation such as that which confronted the businessmen of St. Louis in 1931, pointed out that banks and financial institutions were dependent first upon their own assets and secondarily upon such assistance as they might receive in times of stress, from their own stockholders, from other banks and from corporations and individuals who came to their rescue "either as a gesture of friendship or more frequently, as in the instant proceeding, as a matter of self-defense. The plan, devised and followed by the banks and businessmen of St. Louis, or some modification or variation, was being carried out in many sections of the country. . . . We think therefore it can not be gainsaid that in December of 1931 the transaction entered into by this petitioner was both 'normal' and constituted a then 'common and accepted means of defense' to protect it and its business from an imminent loss."

"We are of the opinion and hold that the amount in question is deductible as an ordinary and necessary expense of carrying on petitioner's trade or business."

It is to be noted that in the Gaylord case, the funds were paid out by petitioner in 1931 under the terms of the agreement. The deduction was taken in 1936 after the petitioner was advised that the amount of the guaranty was being taken. The court allowed the deduction in the year 1936.

In *Moloney Electric Company v. Commissioner* (42 B.T.A. 78, 1940) petitioner subscribed \$5,000.00 to a

guaranty fund in order to induce a solvent bank to assume the liabilities of the Franklin-American Trust Company under the same circumstances as those existing in the Gaylord case referred to above. The Board reached the same conclusion in this case as it did in the Gaylord case, holding that the claimed deduction should be allowed under Section 23 (a) as an ordinary and necessary business expense.

In *Virginia Engineering Co., Inc. v. U. S. A.* (D.C.E.D. Va., 43-1 USTC 9495, 1943) the petitioner was engaged in the contracting business on a large scale and had considerable local investments in the city of Newport News. In 1931, the Schmelz National Bank, the second largest bank in Newport News, became involved in financial difficulties and was informed by the Comptroller of the Currency that it would be forced to close its doors unless a large sum of money was placed at its disposal. The First National Bank agreed to take over the assets and assume the liabilities of the Schmelz Bank, providing that an additional amount of money was contributed by banks, corporations and other businesses to guarantee the First National against a loss on the assets and liabilities of the Schmelz Bank.

The court found that the officers of the First National Bank determined that \$127,000.00 additional would be needed to protect said bank and to justify its directors in taking over the assets and paying the depositors in the Schmelz Bank. The First National was induced to take over the Schmelz Bank in order to prevent it from going into receivership. It was believed that such action would seriously affect all banking and business within the city of Newport News; would cause a run on the other banks in the community and probably the failure of some of them; would paralyze real estate values, which were already low, and adversely affect all business interests in general.

The petitioner subscribed \$10,000.00 to the fund. It had no money on deposit with the Schmelz Bank but had sub-

stantial deposits in two other banks in the city. Its investments in the stock of local corporations, loans to local real estate firms and corporations, and real estate held by it directly totaled a quarter of a million dollars. It also had local contracts amounting to millions of dollars. The officers and stockholders of petitioner believed that if the Schmelz Bank were forced into receivership, petitioner's bank accounts and investments would be jeopardized and that it would sustain heavy losses.

On December 31, 1931, a check of the Virginia Engineering Company for \$10,000.00 was issued payable to the order of the Schmelz Bank. At the same time, a demand note of said bank was issued to the Virginia Engineering Co., Inc.

The court found that: "The advancement of the money to the Schmelz National Bank of Newport News, Virginia, and the acceptance of the note constituted a type of investment made frequently in the crucial period by business concerns, in this section of the country. The officers of Virginia Engineering Company and of 'Schmelz' believed in good faith that the note, or a very substantial part thereof, would be repaid."

The court concluded that the petitioner was entitled to deduct the amount of its loss as an ordinary and necessary business expense within the meaning of Section 23 (a). The court said: "In form it appeared to be a debt due from the bank to the petitioner, that proved worthless but, in substance and reality, the amount advanced to the bank was an expense incurred by petitioner in an effort to protect petitioner's vital interests. At the time the money was advanced there appeared to be a real chance that petitioner would be reimbursed for all or at least a part of the amount. This chance was dependent upon the bank's assets being more than sufficient to satisfy its obligation to the purchasing bank. The substance, not the form, of the transaction should be regarded. Transactions of this nature were not in-

frequent in the early thirties. It was not unusual then for large commercial concerns to lend financial aid to embarrassed banks in an effort to tide them over and thereby avoid general financial disaster in the community, that was likely to result in great direct loss to the concern rendering such aid."

"The deduction was properly taken in 1932. It could not be definitely ascertained whether or not the petitioner would be reimbursed in whole, or at least in part, for the amount advanced by it to the bank until about October 5, 1932."

The case of *First National Bank and Trust Company of Tulsa v. Jones* (143 F. 2d 652, Tenth Circuit, 1944) is not precisely in point but it does indicate that where advancements are made by a business firm without reasonable hope or expectation of a repayment and losses are sustained, such losses may be deductible as ordinary and necessary business expenses even though they may not be deductible as bad debts.

In the *First National Bank* case, *supra*, advancements were made for insurance premium on life insurance policies which had been assigned to the bank as security for the insured's indebtedness to it. At the time the premiums were paid there was no reasonable expectation that the insured would repay the bank. As a matter of fact as soon as the premiums were paid, the bank charged them off on its books. The court said: "Advancements made for insurance premiums, without reasonable hope or expectancy of repayment, are not debts and are deductible, not as bad debts, but as ordinary and necessary business expense when proper business precaution justifies such advancements."

The finding of the Trial Court that one of the considerations for payment of the \$50,000.00 by appellant was the protection of the commercial community supports appellant's contention that the payment was necessary for the protection of its own business interests. In paragraph II

of the stipulation of facts (R. 55) it is shown that in 1932 Alexander & Baldwin, Limited was the agent for five companies operating sugar plantations, three companies operating pineapple plantations, two ranches and two railroad and stevedoring companies, all of which companies were local companies with total net worth of about \$50,000,000.00; that appellant's investment in securities of the above mentioned companies totaled over \$11,000,000.00 and that on December 30, 1930, Alexander & Baldwin, Limited and the companies for which it acted as agent had on deposit in the banks of the Territory of Hawaii at least a sum of \$2,275,000.00

It may be emphasized that in the Gaylord case, *supra*, as in this case, the government contended that the taxpayer had merely made a voluntary contribution; that it participated in a rescue party as a matter of civic pride and that the amount so paid was not an ordinary or necessary expense of carrying on its trade or business.

In a small closely knit island community such as the Territory of Hawaii the effect of the failure of the Waterhouse Company upon appellant's business would have been disastrous. The directors of Alexander & Baldwin, Limited were without authority to make and did not make a voluntary contribution to the Waterhouse Company. The payment was made as a calculated business risk for the primary purpose of preserving and safeguarding of the investment of appellant and of the companies for which it acted as agent in the community. Therefore, the payment of \$50,000.00 to Waterhouse Company is deductible as an ordinary and necessary business expense of Alexander & Baldwin, Limited in the year 1932.

CONCLUSION

It is therefore respectfully submitted that Alexander & Baldwin is entitled to deduct the amount of \$50,000.00 advanced to Waterhouse Company, which became uncollectible in 1932, as a bad debt or as an ordinary and necessary expense of doing business in the year 1932.

Dated: Honolulu, T. H., June 27, 1950.

C. DUDLEY PRATT
VERNON O. BORTZ

Attorneys for Appellant
Alexander & Baldwin, Limited.

Of Counsel:

PRATT, TAVARES & CASSIDY
Alexander & Baldwin Building
Honolulu, T. H.

No. 12500

In the United States Court of Appeals
for the Ninth Circuit

ALEXANDER & BALDWIN, LIMITED, a Corporation,
APPELLANT

v.

AGNES M. KANNE, EXECUTRIX UNDER THE WILL AND OF
THE ESTATE OF FRED H. KANNE, COLLECTOR OF
INTERNAL REVENUE OF THE UNITED STATES FOR THE
DISTRICT OF HAWAII, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE APPELLEE

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
LELAND T. ATHERTON,

Special Assistants to the Attorney General.

RAY J. O'BRIEN,
United States Attorney.

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BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (R. 14-21) is reported in 76 F. Supp. 133.

JURISDICTION

This appeal involves federal income tax for the year 1932. The tax in dispute was paid as follows: \$8,853.06 in tax and \$1,863.51 as interest on October 6, 1936. (R. 43.) A claim for refund covering the tax and interest paid on October 6, 1936, was filed on November 27, 1936, and rejected by notice dated November 14, 1940. (R. 44.)

Within the time provided in Section 3772 of the Internal Revenue Code and on July 21, 1942, the taxpayer brought an action in the District Court for the Territory of Hawaii for recovery of the taxes paid. (R. 2-7.) Jurisdiction was conferred on the District Court by the Act of April 30, 1900, c. 339, 31 Stat. 141, Section 86, as amended. Judgment was entered on December 6, 1949. (R. 47-48.) Within sixty days and on February 2, 1950, a notice of appeal was filed by the taxpayer. (R. 50.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether a payment of \$50,000 in 1931 to a trust company for the purpose of preventing its financial collapse was merely a contribution rather than the creation of an indebtedness of a kind which may be deducted in 1932 under Section 23(j) of the Revenue Act of 1932 as a bad debt ascertained to be worthless and charged off.

2. Alternatively, whether the \$50,000 payment may be deducted as an ordinary and necessary business expense in 1932 under Section 23(a) of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Regulations are printed in the Appendix, *infra*.

STATEMENT

The material facts as found by the District Court (R. 23-41) may be summarized as follows:

The Henry Waterhouse Trust Company, Limited (hereinafter referred to as "Waterhouse"), was a Hawaiian corporation engaged in the trust company business. In 1930 a large part of its assets consisted of real estate and mortgages, and its secretary became

apprehensive that if many calls were made on its demand accounts, due to the effect of the business depression, its condition was not sufficiently liquid to meet its cash requirements. In 1931 it was conducting business as usual, but was encountering some financial difficulties. The Bishop Trust Company (hereinafter referred to as "Bishop"), which had been considering the purchase of Waterhouse's stock for cash, after investigation, advised in 1931 that it would not pay cash for the shares. A. W. T. Bottomley, president of American Factors, Limited, and of a Honolulu bank and vice-president of Bishop, then called a conference of the heads of the principal Hawaiian sugar agencies and banks to present to them the financial condition of Waterhouse and to discuss plans to prevent Waterhouse's forced liquidation. (R. 23-25.)

On February 14, 1931, at a meeting of the directors of Bishop, a plan was presented, largely as a salvage proposition, pursuant to which Bishop would acquire all of Waterhouse's stock without cost and would operate its business for Bishop's own benefit. Cash payments totaling \$1,035,000 were to be made to Waterhouse by Bishop, creditors and others. Included in this total figure was a cash contribution of \$400,000 to be made by a number of corporations and individuals. Waterhouse's assets and liabilities were to be retained by it and were to be liquidated gradually under Bishop's supervision for a fee of \$1,000 per month. Upon final settlement, if any proceeds remained after paying liabilities and expenses, repayment was to be made first to Bishop for any advances made by it in excess of the \$1,035,000 cash, and then pro rata to the contributors of the \$400,000, together with four percent interest. The objects of the plan were to prevent Waterhouse's failure with its general disastrous effects, to prevent loss on the part of the depositors who

could ill afford to lose, and to enable Bishop to acquire new business. The plan as outlined was approved by Bishop's board of directors and the cash payments mentioned were duly made a few days after February 14, 1931. (R. 25-27.)

Prior to that date, certain corporations, including taxpayer, and individuals had promised to pay to Waterhouse upon consummation of the proposed plan the total amount of \$400,000. Taxpayer's contribution was \$50,000. The total amount was actually paid to Waterhouse by the corporations, including taxpayer, and individuals as promised by them. For these contributions Waterhouse's notes bearing interest at four percent were given, subject to being paid however only after other liabilities and expenses of Waterhouse were paid, as provided in the plan and as outlined by Waterhouse in letters to the contributors. (R. 27-34.) The note for \$50,000 issued to taxpayer by Waterhouse was dated February 21, 1931, and contained the provision that (R. 34):

* * * payment of principal and interest to be made only when, if and to the extent that there shall be funds available therefor as set forth in letter of this date from the payor to the payee.

Taxpayer was not a stockholder of Waterhouse. (R. 35.)

An audit report dated March 31, 1931, listed the book value of Waterhouse's assets as of February 14, 1931, as \$4,820,090.92, and the book value of its liabilities, exclusive of capital and surplus, on that date as \$4,149,437.06. The audit report stated that the reserve for losses of \$680,803.15 and the special contingent reserve of \$400,000 were considered adequate to cover probable losses in the realization of assets and liquidation of liabilities. At December 31, 1931, Waterhouse

had actually sustained on liquidation a loss of \$324,-913.77 and at December 31, 1932, a cumulative loss of \$410,345.80, so that at the end of 1932 there remained a balance of \$190,457.35 in the reserve for losses, against which future losses would be charged before there would be an impairment of the special contingent reserve for repaying the \$400,000 contributions to the special noteholders. (R. 35-40.)

The \$50,000 note received by taxpayer was contingent as to payment and subject to such conditions as to render it nonnegotiable at that time and thereafter, and without negotiable value at any time. There is no evidence that taxpayer would have suffered any loss if it had not attempted to keep Waterhouse a going concern. The considerations flowing to taxpayer for its contribution of \$50,000 were the protection of the commercial community, sympathy toward clients of Waterhouse who could not afford to lose, and other commendable desires and motives of helpfulness and security. (R. 40.)

In 1931 taxpayer charged off on its books \$25,000 of the face amount of the \$50,000 note, but did not take a deduction therefor in its income tax return for that year. In 1932 taxpayer charged off on its books the balance of \$25,000 of the face amount of the note and claimed as a deduction the entire amount of \$50,000 as a bad debt in computing its taxable net income for 1932. (R. 41.)

The District Court concluded that the payment of \$50,000 to Waterhouse in 1931 was only a contribution; that the note given to it in acknowledgment of the contribution was not a debt; and that no part of the \$50,000 was deductible in 1932 as a bad debt ascertained to be worthless and charged off within the terms of Section 23(j) of the Revenue Act of 1932. The District Court further held that no part of the \$50,000

was deductible as a loss sustained in 1932 under Section 23(f) of the 1932 Act. (R. 45.)

SUMMARY OF ARGUMENT

The \$50,000 contributed to the Waterhouse fund in 1931 is not deductible in 1932 as a bad debt ascertained to be worthless and charged off in that year under Section 23(j), Revenue Act of 1932. The \$50,000 note received by taxpayer from Waterhouse was not payable at all events but its payment was contingent on Waterhouse having funds to pay it after all of its other liabilities and expenses had been paid. Moreover, the \$50,000 was paid by taxpayer as a contribution to serve the community generally and without expectation of repayment. Under the authorities, both of these circumstances require the conclusion that no debt sufficient to support a deduction under Section 23(j) was created.

Furthermore, assuming *arguendo* only that a valid debt was created, the taxpayer failed to prove facts sufficient to enable the District Court to determine that taxpayer's alleged ascertainment of worthlessness of the debt in 1932 was based on facts warranting that conclusion. Moreover, the record strongly indicates that taxpayer did not deem the "debt" worthless in 1932, assuming *arguendo* that it ever believed the note had value, since it declined to concede its worthlessness for other purposes.

The \$50,000 paid in 1931 is not deductible as an ordinary and necessary business expense in 1932. While the payment is not an ordinary or necessary business expense, even if it were so considered, it accrued in 1931 at the time it was incurred and paid and could not be deducted in 1932 under Section 23(a).

The District Court Did Not Err in Denying the Taxpayer a Deduction in 1932 for the Payment in 1931 of \$50,000 into the Fund for the Henry Waterhouse Trust Company

A. The payment of \$50,000 did not create a valid debt

It is elementary that the allowance of a deduction for a bad debt presupposes the existence of a valid debt arising out of a debtor-creditor relationship. *Harmount v. Commissioner*, 58 F. 2d 118 (C.A. 6th); *Milton Bradley Co. v. United States*, 146 F. 2d 541, 542 (C.A. 1st); *Estate of Van Anda v. Commissioner*, 12 T. C. 1158, 1162. The giving of a note or other evidence of indebtedness which may be legally enforceable is not in itself conclusive of the existence of a bona fide debt. *Montgomery v. United States*, 23 F. Supp. 130 (C. Cls.), certiorari denied, 307 U. S. 632; *Estate of Van Anda v. Commissioner*, *supra*; *Wolff v. Commissioner*, 26 B.T.A. 622; *Griffiths v. Commissioner*, 25 B.T.A. 1292; *Hayes v. Commissioner*, 17 B.T.A. 86.

‘ A conditional obligation does not give rise to a debt. *Shiman v. Commissioner*, 60 F. 2d 65, 66 (C.A. 2d); *Milton Bradley Co. v. United States*, *supra*, p. 542; *S. Naitove & Co. v. Commissioner*, 32 F. 2d 949 (C.A. D.C.); *Wolff v. Commissioner*, *supra*, p. 626. This principle was explained by the First Circuit in the *Milton Bradley Co.* case as follows (p. 542):

One of the underlying conditions of validity is an unconditional obligation of the debtor to pay the creditor. “The debts which the statute permits to be charged off when ascertained to be worthless are debts where there is an obligation of the debtor to pay and a right of the creditor to receive and enforce payment.” *J. S. Cullinan v. Commissioner of Internal Revenue*, 19 B.T.A. 930. “The sine qua non of a debt is the obligation to pay. * * * And this means not a contingent obligation, * * *.” *Wolff v. Commissioner of Internal Rev-*

enue, 26 B.T.A. 622, 626, and cases cited. The liability to pay in the future, contingent upon something which may or may not occur, is not indebtedness, and the taxpayer may not treat as worthless debts amounts which are at a particular time merely contingent liabilities. *Eckert v. Burnet*, 1931, 283 U. S. 140, 51 S. Ct. 373, 75 L. Ed. 911; *S. Naitove & Co. v. Commissioner of Internal Revenue*, 1929, 59 App. D.C. 53, 32 F. 2d 949; *Wolff v. Commissioner*, *supra*. Where the liability to pay is not absolute, the existence of a deductible debt has not been accepted. *Howell v. Commissioner of Internal Revenue*, 8 Cir., 1934, 69 F. 2d 447, certiorari denied; *Howell v. Helvering*, 1934, 292 U. S. 654, 54 S. Ct. 864, 78 L. Ed. 1503; *American Cigar Co. v. Commissioner of Internal Revenue*, 2 Cir., 1933, 66 F. 2d 425, certiorari denied 133, 290 U. S. 699, 54 S. Ct. 209, 78 L. Ed. 601; *In re Park's Estate*, 2 Cir., 1932, 58 F. 2d 965, certiorari denied, 1932, *Park's Estate v. Commissioner of Internal Revenue*, 287 U. S. 645, 53 S. Ct. 91, 77 L. Ed. 558. * * *

The District Court in this case concluded (R. 45) that the payment of \$50,000 to Waterhouse in 1931 was just a contribution by taxpayer, that the note given was contingent as to payment and subject to such conditions as to render it without negotiable value at any time, and that it therefore cannot be dealt with as a debt. If the note was contingent as to payment, the District Court was manifestly correct under the cited authorities¹ in concluding that it was not a "debt"

¹ The cases of *Clay Drilling Co. v. Commissioner*, 6 T. C. 324, and *Western Woodwork & Lumber Co. v. Commissioner*, decided May 9, 1947 (1947 P-H T.C. Memorandum Decisions, par. 47,124), are cited by taxpayer (Br. 14-16) as authority to the contrary. The issue in the *Clay* case was whether a valid indebtedness had been cancelled and forgiven in an earlier year as a result of an agreement under which the debt became payable only in the manner agreed upon. The Tax Court held that it was not cancelled. While the *Western* case did apparently rule that a note represented a debt despite the contingent nature of its payment, no deduction

which can be the basis of a deduction for a bad debt under Section 23(j) of the Revenue Act of 1932 (Appendix, *infra*).

It is plain that the finding that the note was contingent as to payment could not be successfully challenged, and the taxpayer does not attempt to do so. The note given to taxpayer by Waterhouse had a proviso which read (R. 34)—

* * * payment of principal and interest to be made only when, if and to the extent that there shall be funds available therefor as set forth in letter of this date from the payor to the payee.

The conditions stated in the letter (R. 28-34) were that payment was to be made only after expenses of the liquidation, \$1,000 per month to Bishop for supervision, interest, indebtedness, and other liabilities were paid in that order, and after Bishop was reimbursed for the amounts contributed by it, if any, required (in excess of the \$1,035,000) to liquidate Waterhouse's liabilities. The fact that the note was not absolute as to payment is alone enough to require the finding that no debt sufficient to support a deduction under Section 23(j) was created.

Moreover, it has been repeatedly held that advances voluntarily made without expectation of repayment do not create a "debt" which can provide the basis for a bad debt deduction. *Spring City Co. v. Commissioner*, 292 U. S. 182, 189; *Porter v. United States*, 27 F. 2d 882 (C.A. 9th); *American Cigar Co. v. Commissioner*, 66 F. 2d 425 (C.A. 2d), certiorari denied. 290 U. S. 699; *W. F. Young, Inc. v. Commissioner*, 120 F. 2d 159 (C.A. 1st); *Busch v. Commissioner*, 50 F. 2d 800

for a bad debt was allowed in 1943 because the note became worthless in an earlier year. To the extent that the unreviewed memorandum opinion of the Tax Court in the *Western* case is contrary to the authorities cited above, it is against the clear weight of authority and is, we submit, incorrect.

(C.A. 5th); *Menihan v. Commissioner*, 79 F. 2d 304 (C.A. 2d); *Hayes v. Commissioner*, 17 B.T.A. 86, 87; *Wolff v. Commissioner*, 26 B.T.A. 622; see particularly, *Davis v. Commissioner*, decided November 3, 1937 (1937 P-H B.T.A. Memorandum Decisions, par. 37, 312); *McLeod v. Commissioner*, 19 B.T.A. 134, 139.

That principle is applicable here in support of the conclusion that no real debt was created. The District Court found that the payment of \$50,000 was merely a contribution without expectation of repayment, other than preventing Waterhouse from closing due to its insolvent condition and protecting the commercial community and Waterhouse's clients who could ill afford to lose. (R. 40, 45.) These findings are clearly correct when all the circumstances existing at the time that taxpayer was solicited to contribute to the fund and agreed to do so are taken into account. Although taxpayer argues (Br. 10-18) that the findings in this respect are erroneous, the testimony of the witnesses relied on (Br. 12-13) at most indicates that some of those who contributed expected and hoped that some part of the contributions would not be needed and would be returned. Facts with respect to Waterhouse's financial position in 1931 to support such a hope were not shown; the Waterhouse balance sheet and the audit report prepared at the time based on book figures (R. 35-40) were not shown to represent the actual value of the assets. And, it is obvious from the whole record that the contributions were made for the principal purpose or motive of preventing Waterhouse's failure, irrespective of whether the contributions might be returned in whole or in part. Indeed, taxpayer apparently concedes (Br. 16) that the motive for paying the money to Waterhouse was the protection of the commercial community as the District Court found, but argues that the reason for making the advance and its wisdom

from the standpoint of being repaid are not pertinent. Such matters of course are material on the question of whether the payment was voluntarily made without expectation of repayment, and the District Court's finding here on that question is amply supported and is correct.

There is no evidence that taxpayer would have lost anything through Waterhouse's failure if it had not contributed to the fund, as the District Court found (R. 40), and the contribution was not therefore required to protect an existing indebtedness, investment or claim against Waterhouse. This is additional confirmation that the contribution was voluntarily made.

It is submitted that the District Court's finding that the taxpayer's payment of \$50,000 into the Waterhouse fund was not a debt was correct and should be affirmed.

B. The debt was not ascertained to be worthless in 1932

The District Court concluded that no part of the \$50,000 was deductible as a bad debt ascertained to be worthless and charged off within the taxable year 1932 within the terms of Section 23(j) of the Revenue Act of 1932. (R. 45.)

Even if it is assumed, *arguendo* only, that the payment of the \$50,000 into the Waterhouse fund created a valid debt, we believe the evidence clearly supports the District Court's conclusions stated above. The record discloses that a reserve of \$680,803.15 was set up on the books of Waterhouse as at February 14, 1931, after the reorganization against which all liquidating and operating losses were to be charged. (R. 39.) The District Court made a finding of fact (to which the taxpayer does not express any disagreement) which reads as follows (R. 40) :

At December 31, 1931, Henry Waterhouse Trust Company had sustained on liquidation actual

losses amounting to \$324,913.77, and at December 31, 1932, it had sustained on liquidation cumulative actual losses totaling \$410,345.80 so that at the end of 1932 there was still a balance of \$190,457.35 remaining in the Reserve for Losses, against which future losses must be paid before there would be any impairment for the repayment of the \$400,000.00 contributions to the special noteholders.

Nevertheless, the taxpayer asserts (Br. 17-18) that by the end of 1932 it became apparent to it that, by reason of the further reduction in the value of the assets out of which the notes were to be paid, the note held by it was valueless and was charged off as a loss on its books. As a matter of fact, the taxpayer charged off \$25,000, or one-half of the face amount of the note, as worthless in the year 1931, and the balance in 1932. (R. 41.)

The taxpayer refers to the testimony of Messrs. Lowrey, Castle and Linden (Br. 17), but we submit that their testimony merely indicates that the taxpayer relied upon the opinions of others without investigation and proof of the facts upon which their opinions were based. It is a fundamental rule that mere statements of opinion as to worthlessness are insufficient to satisfy the statutory requirements, and that the facts with respect to the alleged valuelessness of the notes must be presented to the court so that it may form an independent judgment as to the ascertainment of worthlessness. *Rosenthal v. Helvering*, 124 F. 2d 474 (C.A. 2d); *Georgia Engineering Co. v. Commissioner*, 21 B.T.A. 532, 547-548; *Gano v. Commissioner*, 19 B.T.A. 518. This Court in *American Trust Co. v. Commissioner*, 31 F. 2d 47, held that an investigation which shows only that the debtor is in an unsatisfactory financial condition and that the collection of the debt is doubtful, is not a sufficient ascertainment of worthlessness. So, we submit that the testimony of these indi-

viduals is not a sufficient showing of worthlessness.

Despite the assertion to the contrary made in the taxpayer's brief (pp. 17-18), we submit that the evidence of record indicates clearly that the taxpayer could not have been convinced that the note had become valueless in 1932, assuming *arguendo* of course that taxpayer ever believed that the note had value.² As the District Court found, at the end of 1932 the reserve for liquidating losses had not been exhausted. (R. 40.) Also the letter from Waterhouse in 1932 contained the following (R. 90):

Despite the worthlessness of the note it remains an apparent liability of this Company and operates as a hindrance to its speedy liquidation, especially as so long as it remains on our books the Advisory Committee will have to be continued. *Hence we suggest that you concede the worthlessness of the note by formally authorizing this Company to consider that it is no longer an obligation.* (Italics supplied.)

It was stipulated that the advisory committee was not abrogated but continued to function as usual during the balance of 1932 and the year 1933. (R. 68.) Lowrey testified that the taxpayer did not make a formal reply to the Waterhouse letter. Not only did the taxpayer refuse to comply with the request of Waterhouse that it formally concede that the note was worthless and surrender it to Waterhouse, but the other noteholders likewise refused to do so. Yet, for federal income tax purposes, the taxpayer seeks relief here on the ground that it ascertained the note to be worthless in 1932, having refused, however, to make such a concession to Waterhouse. The fact that it charged off the note as a loss on its books is insufficient. *Spring*

² The District Court noted in its opinion that the taxpayer knew of the insolvency of Waterhouse at the time it made the \$50,000 contribution in 1931. (R. 16.)

City Co. v. Commissioner, 292 U. S. 182, 189. Furthermore, the charge off it made does not support its contention that the note was ascertained to be worthless in 1932 for, as pointed out above, it charged off \$25,000 or one-half of the face amount of the note, as worthless in the year 1931, and the balance in the following year. (R. 41.)

In view of the foregoing, we believe the District Court's conclusion that no part of the \$50,000 was deductible as a bad debt ascertained to be worthless and charged off within the taxable year 1932 is fully supported by the evidence and should be sustained.

C. Neither is the \$50,000 paid to Waterhouse deductible as an ordinary and necessary business expense of the taxpayer in 1932

In the alternative, the taxpayer maintains (Br 18-26) that the District Court should have allowed it to deduct the \$50,000 as an ordinary and necessary business expense in the year 1932.³

³ It should be noted that the taxpayer's refund claim (Deft. Ex. 3) did not contain any allegation that this payment was deductible as an ordinary and necessary expense of carrying on the taxpayer's business. Hence, we submit, the taxpayer may not raise here that issue. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269; *Red Wing Malting Co. v. Willcuts*, 15 F. 2d 626, 634 (C.A. 8th), certiorari denied, 273 U.S. 673; *Lynch v. Rogan*, 50 F. Supp. 356, 357 (S.D. Cal.); *Kemper Military School v. Crutchley*, 274 Fed. 125, 128 (W.D. Mo.).

In this connection, it is also interesting to note that the taxpayer in the "Statement of Points Upon Which Appellant Intends to Rely on Appeal" (R. 95-96), at paragraph 6 thereof, alleges error on the part of the District Court in concluding that no part of the \$50,000 payment was deductible as "a loss sustained during that taxable year [1932]", whereas in its brief (p. 8) under the "Specification of Errors Relied on", the taxpayer at paragraph 6 thereof abandons its allegation of error respecting the disallowance of the deduction claimed as a loss, and substitutes therefor as a new allegation of error that the District Court erred in concluding that no part of the \$50,000 payment was deductible as "an ordinary or necessary expense of carrying on its business for the year 1932."

Section 23(a) of the Revenue Act of 1932 (Appendix, *infra*) permits deduction of only the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any business. There is no evidence to support a conclusion that the expenditure of the \$50,000 was an ordinary and necessary expense of carrying on the taxpayer's business during the taxable year 1932. It was not usual and customary in the agency and factoring business to make a contribution of this sort nor was it necessary for taxpayer to do so. On the contrary, the contribution was extraordinary in nature. Moreover, the record shows that the money was paid into the fund in 1931 (R. 15-16, 40, 76-77), the taxpayer having in that year unconditionally promised to pay the amount of \$50,000 to Waterhouse (R. 27). As the taxpayer's books are kept on the cash basis of accounting and its federal income tax returns have at all times been on that basis and on the calendar year (Br. 2-3; R. 71), it could not deduct this expenditure, or any part of it, as an expense of doing business in the calendar year 1932, since its liability became fixed in the year 1931 when the payment was actually made.

In *Robert Gaylord, Inc. v. Commissioner*, 41 B.T.A. 1119, and *Moloney Electric Co. v. Commissioner*, 42 B.T.A. 78, relied on by taxpayer here (Br. 20-23), the Tax Court reached a conclusion on the facts there that the payments involved could be deducted as an ordinary and necessary business expense in 1936. The amounts in question there were actually paid in 1936, the year in which allowed, although they had been deposited in a bank in 1931 where they were held, drawing interest, until needed by the bank being liquidated. Thus, those decisions, whatever view is taken as to their validity, are not authority for allowing the deduction to this taxpayer in 1932, where the liability for the

contribution accrued and the contribution was paid in 1931.

Virginia Engineering Co. v. United States (E.D. Va.), decided June 16, 1943 (32 A.F.T.R. 1751, 1753), discussed in taxpayer's brief (pp. 23-25) is distinguishable from the instant case in that the trial court in that case made a specific finding that the amount advanced to the Schmetz fund was made "in an effort to protect petitioner's *vital* interests." (Italics supplied.)

A careful reading of the decision in *First Nat. Bank & Trust Co. of Tulsa v. Jones*, 143 F. 2d 652 (C.A. 10th), discussed by taxpayer's counsel (Br. 25-26), discloses that the premiums taken as a deduction there were paid by the bank on insurance policies left with it as collateral for loans made in the conduct of its business, so the premiums clearly were ordinary and necessary expenses of carrying on its business. The situation in the instant case is so different that that case is not apposite here.

The taxpayer has the burden of bringing the deduction sought by it clearly within the terms of the applicable statutory provision. This the taxpayer has failed to do here.

In view of the foregoing, we submit that the District Court's conclusions were correct and should not be disturbed.

CONCLUSION

The decision of the court below as to the nondeductibility of the \$50,000 contribution to the Waterhouse fund on the undisputed facts of the case was correct and therefore should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
LELAND T. ATHERTON,
*Special Assistants to the
Attorney General.*

RAY J. O'BRIEN,
United States Attorney.

AUGUST, 1950.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * *

(f) *Losses by Corporations*.—Subject to the limitations provided in subsection (r) of this section in the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

(j) *Bad Debts*.—Debts ascertained to be worthless and charged off within the taxable year * * *

* * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayers; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", depend-

ent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 121. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 141-272. * * *

ART. 171. *Losses.*— * * *

Subject to the limitations on losses from sales or exchanges of stocks and bonds provided in section 23 (r) and article 272, losses sustained by corporations during the taxable year and not compensated for by insurance or otherwise are also fully deductible.

Losses must usually be evidenced by closed and completed transactions. * * *

* * * * *

ART. 191. *Bad debts.*— * * *

Where all the surrounding and attending circumstances indicate that a debt is worthless, either wholly or in part, the amount which is worthless and charged off or written down to a nominal amount on the books of the taxpayer shall be allowed as a deduction in computing net income. There should accompany the return a statement showing the propriety of any deduction claimed for bad debts. No deduction shall be allowed for the part of a debt ascertained to be worthless and charged off prior to January 1, 1921, unless and until the debt is ascertained to be totally worthless and is finally charged off or is written down to a nominal amount, or the loss is determined in some

other manner by a closed and completed transaction. Before a taxpayer may charge off and deduct a debt in part, he must ascertain and be able to demonstrate, with a reasonable degree of certainty, the amount thereof which is uncollectible. * * *

* * * * *

ART. 321. *Computation of net income.*—Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditures which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See articles 331-333.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

ART. 341. *"Paid or incurred" and "paid or accrued."*—The terms "paid or incurred" and "paid or accrued" will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48(c).) The deductions and credits provided for in Title I must be taken for the taxable year in which "paid or accrued" or "paid or incurred," unless in order clearly to reflect the income such deductions or credits should be taken as of

a different period. If a taxpayer desires to claim a deduction or a credit as of a period other than the period in which it was "paid or accrued" or "paid or incurred," he shall attach to his return a statement setting forth his request for consideration of the case by the Commissioner together with a complete statement of the facts upon which he relies. However, in his income tax return he shall take the deduction or credit only for the taxable period in which it was actually "paid or incurred," or "paid or accrued," as the case may be. Upon the audit of the return, the Commissioner will decide whether the case is within the exception provided by the Act, and the taxpayer will be advised as to the period for which the deduction or credit is properly allowable.

ART. 342. *When charges deductible.*—Each year's return, so far as practicable, both as to gross income and deductions therefrom, should be complete in itself, and taxpayers are expected to make every reasonable effort to ascertain the facts necessary to make a correct return. The expenses, liabilities, or deficit of one year can not be used to reduce the income of a subsequent year. (But see section 117 and articles 651-655.) A taxpayer has the right to deduct all authorized allowances, and it follows that if he does not within any year deduct certain of his expenses, losses, interest, taxes, or other charges, he can not deduct them from the income of the next or any succeeding year. * * *

No. 12502

United States
Court of Appeals
For the Ninth Circuit.

W. E. BUELL, Trustee for the Bond Holding
Creditors of the Montague Water Conservation
District,

Appellant.

vs.

MONTAGUE WATER CONSERVATION DIS-
TRICT, Bankrupt, and THE CITY OF
MONTAGUE,

Appellees.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Northern Division.

FILED
MAY 4 - 1950

PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SAMUEL R. FRIEDMAN, ESQ.,

Attorney for Petitioner.

Warrens Building,
111 South Broadway,
Yreka, California.

BARR AND HAMMOND,

J. EVERETT BARR, ESQ.,

Attorneys for Trustee.

Warrens Building,
Yreka, California.

In the United States District Court for the Northern District of California, Northern Division.

No. 10503

In the Matter of the:

MONTAGUE WATER CONSERVATION DISTRICT,

Bankrupt.

PETITION FOR EQUITABLE RELIEF

Comes now the City of Montague, a municipal corporation of the State of California, and alleges and represents to this Honorable Court as follows, to wit:

I.

That the City of Montague is a municipal corporation of the State of California, duly organized and existing under the laws of the State of California as a City of the Sixth Class.

II.

That the Montague Water Conservation District is a public corporation of the State of California, duly organized and existing under the laws of the State of California, as more fully appears in the files of this Court respecting this action.

III.

That W. E. Buell has heretofore constituted and appointed and now is the Trustee in Bankruptcy

in the above-entitled matter and does represent the bond holding creditors of the bankrupt district.

IV.

That pursuant to proceedings had and taken in this Court, the Montague Water Conservation District and the creditor bond holders having claims against said district did on the 6th day of December, 1943, enter into a composition agreement approved by this Court on March 4, 1944, wherein the rights and obligations of said creditor bond holders and said Montague Water Conservation District were set forth; that said agreement last above referred to and the files and records of this Court appertaining thereto are incorporated in this Petition as the same may appear of record herein, as though the same were fully set forth herein, the same being hereby adopted by reference to the files of this Court; that at no time was any notice of any character whatsoever, as provided by law, given to your petitioner, The City of Montague, indicating or giving notice of any liability against the properties of said city, hereinafter described, by reason of the said composition agreement above referred to.

V.

That your petitioner, The City of Montague, is the owner in fee of and in possession of all of those certain lands, premises and appurtenances thereto, situate, lying and being in the County of Siskiyou,

State of California, and more particularly described as follows, to wit:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-Five North (T 45 N), Range Six West (R 6 W), MDB&M, and any and all other property assessed by said district against said city, petitioner.

That the above described premises so owned by said City of Montague are devoted to a governmental purpose and are used for municipal and governmental purposes consisting of a publicly owned airport, sewage disposal and fire protection.

VI.

That for the fiscal year 1945-46, the Fiscal Officers did cause to be levied upon the above-described property of your petitioner and to appear upon the assessment rolls of said district on assessment and tax for the servicing and retirement of delinquent district bonds and interest thereon in said district, that authority for such levy does not appear in the minutes or records of said district; that at all times herein mentioned, the above-described property of your petitioner was and now is devoted to a public use as herein set forth.

VII.

That in the fiscal year 1946-47 the Fiscal Officers of said district did again assess and endeavor to impose upon the property of the petitioner, above-

described, an additional levy for the servicing of said delinquent Irrigation District Bonds.

VIII.

That prior to the 4th day of March, 1944, and prior to the confirmation of the above-referred to composition agreement between the said W. E. Buell and the Montague Water Conservation District, notices were given to the property owners to be affected by the terms of said agreement; that said notices were given in a manner approved by this Court; that no notices of any kind or nature were given to your petitioner under said agreement above referred to, affecting the property in this petition described, and that said agreement purposely omitted the property of petitioner as said property is hereinabove described.

IX.

That your petitioner is informed and believes, and upon such information and belief alleges that the action of the Fiscal Officers of said Montague Water Conservation District were caused and induced by said W. E. Buell, as Trustee for the bond holders, and that but for the activities and representations of said Buell and his counsel, the officers of said Montague Water Conservation District would not have endeavored to impose a levy upon the property of your petitioner, above-described; that at all times herein mentioned, said Buell knew that said municipally owned property

of petitioner was not included in said composition agreement above referred to.

X.

That unless prevented by Order of this Court, the Officers of said Montague Water Conservation District will cause a deed to be issued to said W. E. Buell, Trustee for said bond holders, covering said municipal property of petitioner, the City of Montague, as said property is in this petition described.

Wherefore, your petitioner prays judgment as follows:

(1) That the Honorable Court above-entitled decree the rights of the parties hereto;

(2) That it be decreed that the bankrupt Montague Water Conservation District be not entitled to levy any bond assessment against the property of your petitioner and described in the complaint.

(3) That this Court decree that the Trustee in Bankruptcy and the said bankrupt are not entitled to have recourse to the property and lands in the Complaint described as belonging to the City of Montague as in this petition set forth.

(4) That this Court decree such other and or different relief as may seem proper in the premises and that your petitioner may have its costs of suit herein.

/s/ SAMUEL R. FRIEDMAN,

Attorney for City of Montague.

State of California,
County of Siskiyou—ss.

Jesse Jones, being first duly sworn deposes and says:

That he is the duly elected, qualified and acting Mayor of the City of Montague, State of California, and as such he is authorized to execute this verification in behalf of said City of Montague; that he knows the verity of the foregoing petition and the contents thereof and that the same is true of his own knowledge, except where therein stated on information or belief and as to such matters he believes it to be true.

/s/ JESSE C. JONES,

Mayor.

Subscribed and sworn to before me this 29th day of November, 1948.

[Seal]: /s/ SAMUEL R. FRIEDMAN,
Notary Public in and for the County of Siskiyou,
State of California.

Service of the within Petition is hereby acknowledged and copy thereof received on this 9th day of May, 1949. It being stipulated that the hearing of the within Petition may be heard by the above-entitled Court on the 20th day of June, 1949.

/s/ FLOYD MERRILL,

Attorney for Montague Water Conservation District.

/s/ J. EVERETT BARR,

Attorneys for W. E. Buell,
Trustee.

[Endorsed]: Filed May 11, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION
TO STRIKE

To City of Montague and to Samuel R. Friedman,
its attorney:

You and each of you will please take notice that upon the 20th day of June, 1949, at the hour of 10:00 o'clock a.m. of said date, at the regular place of setting of the above entitled court in the Post Office Building at Sacramento, California, the respondent W. E. Buell will move this honorable court for its order to strike the "Petition for Equitable Relief" heretofore filed by the City of Montague.

Said motion will be made upon the grounds that the said petition is not a proper proceeding in a bankruptcy matter.

Said motion will be based upon this notice of motion and upon all of the records and filed in the above entitled matter.

Dated this 14th day of June, 1949.

BARR AND HAMMOND,
/s/ J. E. BARR,
Attorneys for W. E. Buell,
Trustee.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR
EQUITABLE RELIEF

Now comes W. E. Buell, Trustee, and answering unto Petition for Equitable Relief on file herein admits, alleges and denies as follows:

I.

Admits paragraphs I, II, and III of said petition.

II.

Admits paragraph IV of said petition except that your trustee denies that no notice was given to petitioner and in connection therewith alleges that all notices which are required by law were given to the said petitioner.

III.

Answering paragraph V of said petition, admits that the City of Montague is the owner of the land described therein subject however to certain liens in favor of the Montague Water Conservation District; denies that said land or any portion thereof is to be used for municipal and governmental purposes.

IV.

Answering paragraph VI and VII of said petition, admits that assessments were made, denies that notice was not given.

V.

Answering paragraph VIII of said agreement admits that a composition agreement was entered into; admits that notices were given; denies that no notice was given to petitioner, and in connection therewith alleges that petitioner was not injured in any matter or form if notice was not given.

VI.

Admits paragraph IX and X of said petition except that said trustee denies that the property referred to in paragraph IX is municipally owned.

As a Separate, Second and Distinct Defense, the Trustee alleges as follows:

I.

That the petitioner has been guilty of laches and unreasonable delay in filing this petition in that the assessments complained of have been made for a period in excess of three (3) years and the Trustee relying upon said assessments has proceeded to include the said property contained herein in the general plans for the administration of the bankrupt estate.

Wherefore, respondent prays that petitioner take nothing by this petition.

Dated this 14th day of June, 1949.

BARR AND HAMMOND,

/s/ J. E. BARR,

Attorneys for W. E. Buell,
Trustee.

State of California,
County of Siskiyou—ss.

J. Everett Barr, being first duly sworn, deposes and says:

That he is one of the attorneys for the respondent in the above entitled matter; that he has read the above and foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief, and as to such matters, that he believes it to be true;

That this verification is made by affiant instead of by said respondent, personally, for the reason that said respondent is absent from the County of Siskiyou, where said affiant has his office.

/s/ J. EVERETT BARR.

Subscribed and sworn to before me this 14th day of June, 1949.

[Seal]: /s/ MARJORIE SCHAFER,
Notary Public in and for the County of Siskiyou,
State of California.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR
EQUITABLE RELIEF

Comes now Montague Water Conservation District and answering unto petition for equitable relief on file herein, admits, alleges and denies as follows:

I.

Answering the allegations of Paragraphs I, II and III of said petition this answering respondent admits each and every, all and singular, the allegations therein contained.

II.

Answering the allegations of Paragraphs IV and V of said petition this answering respondent admits each and every, all and singular, the allegations therein contained.

III.

Answering the allegations of Paragraphs VI and VII of said petition this answering respondent admits each and all the allegations therein contained except denies that authority for such levy does not appear in the minutes or records of said District.

IV.

Answering the allegations of Paragraph VIII of said petition this answering respondent denies that no notice of any kind or nature were given to petitioner under the agreement referred to in said

paragraph and in this respect alleges that all legal notices required to be given by law and order of Court were duly and regularly given as appears from the files and records herein.

Wherefore, this answering respondent prays that petitioner take nothing by his said petition.

/s/ FLOYD MERRILL,

Attorney for Montague Water Conservation District, Respondent.

State of California,
County of Siskiyou—ss.

Orville L. Abbott, being duly sworn on behalf of the Irrigation District in the above-entitled action, says: That he is the Secretary of said Irrigation District; that he has read the foregoing Answer to Petition for Equitable Relief and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ ORVILLE L. ABBOTT.

Subscribed and sworn to before me this 15th day of June, 1949.

[Seal] /s/ FLOYD MERRILL,

Notary Public in and for the County of Siskiyou,
State of California.

My Commission Expires Feb. 5, 1951.

Service of copy acknowledged.

[Endorsed]: Filed June 17, 1949.

[Title of District Court and Cause.]

STIPULATION

The undersigned, Floyd Merrill, Esq., Attorney for the Montague Water Conservation District; Barr & Hammond, Esqs., Attorneys for Trustee, W. E. Buell; and Samuel R. Friedman, Esq., Attorney for the City of Montague, hereby stipulate to the following facts:

In reply to the letter of Honorable Dal M. Lemmon, dated October 28, 1949, it is hereby stipulated by and between the undersigned, that the indebtedness embraced in the composition agreement dated December 6, 1943, which agreement was approved by the above-entitled Court, and which indebtedness was agreed therein to be discharged under said composition agreement, is the same indebtedness for which the assessment was made by the Montague Water Conservation District against the real property of the City of Montague, commonly referred to as the airport property and described as being in Section 21, Township 45 North, Range 6 West, M.D.B. & M., and which property was expressly excluded from the said composition agreement. That is to say, the assessment levied by the said District against the said airport property described in the Petition and owned by the City of Montague, which property was expressly excluded from the composition agreement and does not appear therein, was

for the sole purpose of discharging the indebtedness set forth in said composition agreement.

Dated: November 4th, 1949.

/s/ FLOYD MERRILL,

Attorney for Montague Water
Conservation District.

/s/ J. EVERETT BARR,

Attorneys for Trustee,
W. E. Buell.

/s/ SAMUEL R. FRIEDMAN,

Attorney for City of
Montague.

[Endorsed]: Filed November 14, 1949.

[Title of District Court and Cause.]

MEMORANDUM

A petition for equitable relief has been filed herein by the City of Montague in which it seeks a holding by this court that the Montague Water Conservation District, bankrupt, is not entitled to levy a bond assessment against property owned by the city and used as a garbage dump, sewage disposal plant and airport, and more particularly described as follows:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-five North (T 45 N), Range Six West (R 6 W), M.D.B.&M., and any and all other property assessed by said district against said city, petitioner.

The property is outside the city limits.

By stipulation it is agreed that the assessment is based on and is for the purpose of discharging the indebtedness, the subject of the composition agreement.

Paragraph VIII of the petition alleges that the property in question was purposely omitted from the composition agreement entered into. This is not denied in the answer of the trustee and therefore must be deemed admitted.

Trustee contends that this court has no jurisdiction of the matter and that the petitioner is not harmed as it is in the same position as it was prior to the composition.

Composition is held to be in the nature of a contract. In *re Adler* 103 F 444, *Hanssen, et al v. Wingren* 121 F 2d 1011. *American United States Life Ins. Co. v. Haines City, Florida*, 117 F 2d 574, 576 states, "A composition, after confirmation, ought to be respected as a contract, and not disturbed in its substance for light cause, or so as to give one part an advantage over the other; and especially so after partial execution." The assessment of the land in question for the purpose mentioned if upheld changes the composition. This is so even though petitioner, with respect to the land in question, was not a party to the composition. The composition plan recites, "And whereas, the schedule has been prepared by the parties hereto in which each tract of land in the district has been listed and an amount set opposite the description of each tract, and such schedule has been attached

hereto and marked Exhibit "B" and by reference made a part of this contract." Since this purports to include all the land in the district, or by inference all the land that is to be charged with the composition, petitioner may rely upon the omission of its land in composition and the confirming order as a determination that this land is not subjected to the indebtedness.

The natural consequence of the submitted plan was to lull the city into a state of inaction thereby foregoing several courses of action open to it, to-wit—(1) pay the burden referred to in the composition as the "cash price" and receive releases therefor; (2) take advantage of the term price; (3) object to the amount of, or any assessment allocated against the property in question. If the relief asked for were not granted the City is in the position of being bound by an order which was made under the implied assurance mentioned.

This court has jurisdiction over this matter since it is here interpreting the effect of the plan of composition, and as such, a part of the bankruptcy proceedings. The bankruptcy court sitting as a court of equity will exercise the doctrine of estoppel when it seems proper.

Several years having intervened between the date of the approval of the plan of composition and the trustee's seeking to levy assessments against the property in question the trustee is estopped from now contending that petitioner's land should be assessed.

Therefore in accordance with the views expressed

herein the Directors of the Montague Water Conservation District should be ordered not to levy assessments on the parcel in question herein for the purpose of raising funds to discharge the indebtedness covered by the composition order. Counsel for the City of Montague is directed to serve and lodge findings and judgment in accordance with the local rule.

Dated: November 17th, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed November 17, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial and the court, sitting without a jury, heard the evidence and considered the stipulation of the parties, finds the facts and states the conclusions of law as follows:

Finding of Fact

1. That the City of Montague is a municipal corporation of the State of California, duly organized and existing under the laws of the State of California as a City of the Sixth Class.

2. That the Montague Water Conservation District is a public corporation of the State of California, duly organized and existing under the laws

of the State of California, as more fully appears in the files of this Court respecting this action.

3. That W. E. Buell has heretofore constituted and appointed and now is the Trustee in Bankruptcy in the above-entitled matter and does represent the bond holding creditors of the bankrupt district.

4. That pursuant to proceedings had and taken in this Court, the Montague Water Conservation District and the creditor bond holders having claims against said district did on the 6th day of December, 1943, enter into a composition agreement approved by an order of this Court dated March 4, 1944, wherein the rights and obligations of said creditor bond holders and said Montague Water Conservation District were set forth; that the property hereinafter described and commonly referred to as the Airport Property and owned by the City of Montague, was expressly excluded from said Composition Agreement above mentioned, and that at no time was any notice of any character whatsoever, as provided by law, given to said City of Montague, indicating or giving notice of any liability against said property hereinafter described and owned by said City of Montague, by reason of the said Composition Agreement above referred to.

5. That the City of Montague is the owner in fee of and in possession of all of those certain lands, premises and appurtenances thereto, situate, lying and being in the County of Siskiyou, State of Cali-

fornia, and more particularly described as follows, to-wit:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-Five North (T 45 N), Range Six West (R 6 W), MDB&M, and any and all other property assessed by said district against said city, petitioner.

That the above described premises so owned by said City of Montague are devoted and used for a public airport, sewage disposal and garbage disposal.

6. That prior to the 4th day of March, 1944, and prior to the confirmation of the above-referred to Composition Agreement between the said W. E. Buell and the Montague Water Conservation District, notices were given to the property owners to be affected by the terms of said agreement; that said notices were given in a manner provided and approved by this Court; that no notices of any kind or nature were given to the City of Montague under said Composition Agreement, and that said agreement and the parties thereto purposely omitted the above described property of the City of Montague from the agreement and from any liability for the indebtedness owing to the bondholders.

7. That the assessment levied by the said Montague Water Conservation District against the property above described and owned by the City of Montague, which property was expressly excluded from the said Composition Agreement and does not appear therein, was for the sole purpose of dis-

charging the indebtedness set forth in said Composition Agreement.

8. That the Montague Water Conservation District, bankrupt, is not entitled to and is estopped from levying any bond assessment against the property above described and owned by the City of Montague with reference to the bond indebtedness set forth in said Composition Agreement.

9. That the assessment levied by the Montague Water Conservation District against the said property of the City of Montague for the bond indebtedness set forth in said Composition Agreement is set aside and vacated.

10. That there is no evidence in support of the answer of the Montague Water Conservation District.

11. That there is no evidence in support of the answer of the Trustee, W. E. Buell, and specifically that the City of Montague was not guilty of laches and unreasonable delay in filing its petition in the above-entitled matter.

Conclusions of Law

1. That the assessment levied by the Montague Water Conservation District against the said property hereinabove described and owned by the City of Montague be, and the same is hereby set aside and vacated, and the Montague Water Conservation District is ordered not to assess said property for

the said bond indebtedness set forth and mentioned in the composition agreement.

2. That the special defense of defendant, W. E. Buell, Trustee for the Montague Water Conservation District, bankrupt, must be dismissed.

It Is So Ordered, and counsel for petitioner will submit appropriate judgment in accordance herewith.

Dated: December 6, 1949.

/s/ DAL M. LEMMON,
U. S. District Judge.

Service of Copy Acknowledged.

Lodged November 25, 1949.

[Endorsed]: Filed December 6, 1949.

In the United States District Court for the Northern District of California, Northern Division

No. 10503

In the Matter of the

MONTAGUE WATER CONSERVATION DISTRICT,

Bankrupt.

JUDGMENT

This cause came on to be heard before the above-entitled Court sitting without a jury, Samuel R. Friedman, Esq., appearing as attorney for the City of Montague; Barr and Hammond, Esqs., appearing as attorneys for W. E. Buell, Trustee; and Floyd Merrill, Esq., appearing as attorney for the Montague Water Conservation District, and evidence

both oral and documentary having been introduced and the cause having been argued by respective counsel, and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows:

It Is Hereby Ordered, Adjudged and Decreed, that the assessment levied by the Montague Water Conservation District against the real property and improvements thereon owned by the City of Montague and commonly known as the Airport Property, as hereinafter described, be, and the same is hereby set aside and vacated, and the said Montague Water Conservation District is ordered not to assess said property for the said bond indebtedness set forth in the Composition Agreement dated December 6, 1943.

That said property owned by said City of Montague and commonly known as the Airport property is situated in the County of Siskiyou, State of California, and more particularly described as follows, to-wit:

All that certain property commonly known as The Montague Airport and situate in Section Twenty-one (21), Township Forty-five North (T 45 N), Range six West (R 6 W), MDB&M, and any and all other property assessed by said district against said city, petitioner.

Dated: December 6, 1949.

/s/ DAL M. LEMMON,
United States District Judge, Northern District of
California, Northern Division.

Lodged November 25, 1949.

[Endorsed]: Filed December 6, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO CIRCUIT COURT OF APPEALS

To the Montague Water Conservation District and
Floyd Merrill, Esq., Its Attorney, to the City
of Montague, Petitioner, and Samuel R. Fried-
man, Its Attorney:

Notice is hereby given that W. E. Buell, Trustee
above named, hereby appeals to the Circuit Court
of Appeals for the Ninth Circuit from the judgment
entered in this action on December 6th, 1949.

Dated this 15th day of December, 1949.

BARR & HAMMOND,
Attorneys for Appellants.
/s/ J. EVERETT BARR,

Service of Copy Acknowledged.

[Endorsed]: Filed December 27, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME
TO DOCKET APPEAL

It is hereby ordered that the Trustee herein have
to and including March 6, 1950, to docket the appeal
heretofore filed in the above entitled matter.

Dated this 13th day of February, 1950.

/s/ DAL M. LEMMON,
Judge of the U. S. District
Court.

[Endorsed]: Filed February 13, 1950.

[Title of District Court and Cause.]

DESIGNATION OF POINTS
RELIED UPON APPEAL

To the Appellee of the Town of Montague and to
His Attorney Samuel R. Friedman:

You and each of you will please take notice that
the Appellant, Trustee W. E. Buell relies upon the
following points:

A. That the Court has no jurisdiction to hear
the petition of the Appellee of the Town of Montague.

B. That the Court erred by law in finding that
the said Town of Montague was injured by the
proposed action of bankrupt of the Montague Water
Conservation District.

C. That the Findings do not support the judgment.

Dated this 9th day of March, 1950.

BARR and HAMMOND,
/s/ J. EVERETT BARR,
Attorneys for Trustee and
Appellant.

Service of Copy Acknowledged.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

You will please take notice that the Appellee requests the following records and proceedings to be contained in the records on appeal.

- A. Petition of Appellee, the Town of Montague.
- B. Motion of the Trustee to strike.
- C. The answer of the Montague Water Conservation District and the answer of the Trustee.
- D. The opinion of the Court and Findings of the Court and the Judgment.

Dated this 8th day of March, 1950.

BARR and HAMMOND,
/s/ J. EVERETT BARR,
Attorneys for Trustee and
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME
TO DOCKET APPEAL

It is hereby ordered that the Trustee herein have to and including March 17; 1950, to docket the appeal heretofore filed in the above entitled matter.

Dated this 11th day of March, 1950.

/s/ DAL M. LEMMON,
Judge of the U. S. District
Court.

Service of Copy Acknowledged.

[Endorsed]: Filed March 11, 1950.

In the District Court of the United States for the
Northern District of California, Northern Division

Before: Hon. Dal M. Lemmon, Judge.

No. 10503

In the Matter of the:

MONTAGUE WATER CONSERVATION DIS-
TRICT,

Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS ON PETITION FOR EQUITABLE
RELIEF AND MOTION TO STRIKE

Monday, June 20, 1949

Appearances:

SAMUEL R. FRIEDMAN, ESQ.,

For the Peitioner,

City of Montague;

J. EVERETT BARR, ESQ.,

For W. E. Buell,

Trustee.

The Clerk: In re Montague Water Conserva-
tion District.

Mr. Barr: This is a motion by the town of
Montague to vacate certain assessments, the motion
being made by Mr. Friedman, for relief, I believe
he calls it, to vacate certain assessments on some
land owned by the town of Montague within the
Montague Conservation District, but outside of the

town boundaries, which, of course, would take it out of the usual question of governmental taxation, because of the constitutional amendment that one taxing agent cannot tax another's property outside of its own boundaries.

We have filed a motion to strike, is the reason I am speaking first, to Mr. Friedman's petition we have filed a motion to strike on the ground it is not something that should be considered in a separate action.

In other words, if the town of Montague or any other property owner—and in this case they are in no better position than a property owner—if they think there is an indirect assessment they would have their remedy in an action to vacate the assessment. It has little or nothing to do with the liquidation problems we have been dealing with in this proceeding, and for that reason we move to strike the petition.

Mr. Friedman: If your Honor please, in respect to counsel's motion to strike, I wish at this time to move to strike that motion on the ground there is insufficient notice and there are no authorities filed to support the motion, on the further ground this petition is proper in the bankruptcy proceedings, it is not a question of incorrect assessment. The property was not assessed at the time that all properties were assessed and incorporated in the composition agreement. The property in question does not appear in that agreement. We feel the Court has the power to determine this petition on the interpretation of the compromise agreement.

With respect to the petition by the City of Montague, your Honor, I wish to introduce a certified copy of deed to the property in question, showing the ownership in the City of Montague.

I also wish to introduce by stipulation a map showing the area that is commonly referred to as the airport area, which includes—the map will show the sewage disposal area of the city.

(The deed was marked Petitioner's Exhibit 1, and the map referred to was marked Petitioner's Exhibit Number 2.)

Mr. Friedman: If the Court please, this proceeding was brought to set aside the assessment made by the district against the lands owned by the city outside the city limits, and which assessment was an arbitrary assessment made by the district and subsequent to the composition agreement approved by this Court.

The City of Montague takes the position that the district is now estopped from making any assessment contrary to the composition agreement.

According to the pleadings and the files in this case, the plan of composition was filed with the Court pursuant to provisions of Sections 81 and 84 of the Bankruptcy Laws of the United States Government, and approved by this Court.

Now, the final composition provided among other things that the bondholders, through their trustee, W. E. Buell, will accept from any individual land owner in the district in full settlement of the liability of such land for the payment of all out-

standing bonds and coupons of the district, whether due or to become due, the amount set forth in Exhibit B opposite the description of such land in the column marked "cash price" and give full releases therefor; also there was provision for time payments in reference to Paragraph 1.

Now, all the property of the district which was to be assessed was set forth in this schedule, Exhibit B.

The property in question, which is owned by the City of Montague, was expressly left out of this composition agreement. To the best of our knowledge of the petitioner, it does not appear in the composition agreement at all. As a jurisdictional fact in this proceeding, all the parties affected were notified by proper notification,—one being by publication for the time required by the act, and another one was by mail, and personal service.

Now, part of the notice that was published provided "any land owners affected by the plan of composition may be entitled to a hearing upon making reasonable application thereof. The land owners therein are thereby referred to the petition and plan of composition attached thereto, now on file," and so forth.

Now, the record will show, I believe, that there is no return of service by the City of Montague with respect to the property. The City was not properly notified, they were not given the opportunity to make any objections whatsoever, and the notice directs—the notice to property owners listed

in Schedule B and part of the composition agreement——

The Court: The town was not so mentioned?

Mr. Friedman: No, your Honor, the town was not so mentioned, so actually as a matter of fact the only notice they had indirectly was that they would not be assessed, and they were lulled into a state of inaction.

Now, had the property been set forth in the compromise agreement, the city would have had three elective rights: one was to pay the full cash price and receive full relief; the second was to take advantage of the term price, and the third was to make objection as to the assessments or as to the amount of the assessment.

The City naturally has availed themselves of no rights, because they were not compelled to, they were not interested in any agreement.

Now, the compromise agreement being in the nature of a contract, and in this respect, your Honor, I wish to call your Honor's attention to an opinion made by your Honor in December of 1947 which covered a very similar point, and this is cited out of your Honor's opinion: "The compromise agreement being in the nature of a contract between the district and all creditors and between the creditors themselves, the parties to the composition should be governed by rules usual in contract matters."

Now, the California Code of Civil Procedure, Section 1962, Subdivision (3) provides that:

"Whenever a party has by his own declaration, act, or omission intentionally and deliberately led

another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Now, the compromise plan has expressly included the property, and no effort was made for three years to make an arbitrary assessment, and the trustee, Mr. Buell, in behalf of the bondholders, induced the district to make this assessment, and the district then went ahead and assessed the property for some \$8,000, in violation of the compromise agreement. Now, the act of omission caused the City to be lulled into a state of inaction. They were not required to do anything.

At this time practically all of the properties in the district have been released by payment to the amount—as to the amounts allocated against them in Schedule B. This property is not in there. To make such assessment at this time would be prohibitive. As I understand it, it would run into a million or two for a piece of property that is worth probably Fifteen or Twenty Thousand Dollars.

The position of the City is that the district should be estopped from making any assessment against the City's property, and the assessments arbitrarily made should be set aside.

And, as I stated to your Honor, the date of your Honor's opinion on the previous point which your Honor decided was December 23, 1947, and in that opinion your Honor held that although the churches are not exempt because they had not availed them-

selves of the exemption statute, that to come in afterwards and assess them the district was estopped.

Now, the petition alleges that the City received no notice. The answer by the trustee for the district alleges that notice was given. However, the answer by the district admits that there is no proper notice, and with respect to notice I refer your Honor to the files and the record.

The Court: You have a memorandum, have you, on file here?

Mr. Friedman: I beg your pardon?

The Court: Have you a memorandum on these authorities?

Mr. Friedman: The authorities I have cited to your Honor?

The Court: Yes.

Mr. Friedman: I have taken them out of your Honor's opinion.

The Court: I wondered if you had a memorandum on file?

Mr. Friedman: No, I have not, but I can furnish one, your Honor. The authorities I have cited here a few minutes ago were taken from your Honor's opinion of December 23, 1947 with respect to the church properties in Montague; but the position now of the city is that the district is estopped, and for the reasons that to allow any assessments would be in violation of the composition agreement, the City was denied their right to compromise the bonded indebtedness, such as the property owners listed in the composition agreement, and the bond-

holders would receive property not contemplated in the composition agreement, and that the notice was jurisdictional, and that the City would deprive it of property without due process of law.

Mr. Barr: I wanted to put on some evidence, unless we stipulate—would you stipulate if Mr. Abbott were called he would testify he is the Secretary of the District, he is in charge of the books, and that the assessment rolls were approved and published in September, 1944 and 1945?

Mr. Friedman: That they were?

Mr. Barr: Yes.

Mr. Friedman: I don't feel it is material, your Honor. We have not raised any point with respect to that.

Mr. Barr: I just want to get the record straight; you are not attacking the validity of the assessment?

Mr. Friedman: Not at this time. We are relying solely on the estoppel principle.

Mr. Barr: Well, that being the case, we do not desire to put on any evidence.

Here is our position, your Honor: In the church case your Honor held there was an estopped because the churches could have gone ahead and filed affidavits claiming exemption, but because of the composition agreement they were lulled into inaction; but in this case the City of Montague is in no different position than if this composition agreement had never existed, the City of Montague is in no better position than if bankruptcy number 10,503 had never been filed.

The City of Montague is bound to do something that the law requires it to do, to pay taxes. It is not hurt——

The Court: In other words, the issue of estoppel is not present here because there is no damage to the city, is that the point?

Mr. Barr: That is right; and for that reason we can see no question of estoppel, because let us suppose that this proceeding had never gone through. There is still no question but that if the directors had been carrying out the law and doing what the law said, they would still have to make a levy to pay the bond issue.

The Court: How about this question of notice never having been given to the city?

Mr. Barr: I don't think they are hurt by it, because they wouldn't be hurt by it any more than if Mr. Day owed me a dollar and Mr. Jones owed me a dollar and I told Mr. Day that I would take fifty cents off his indebtedness, Mr. Jones would have no complaint, because it strictly is purely a beneficiary contract all the way through, and the mere fact that either by omission or by intent we did not give the City of Montague the benefit that we gave the other land owners does not hurt the City of Montague, because they are only doing what they are required to do, and that is to pay the assessment as required by law and by the Water Code of the State of California.

The Court: I would like to have this submitted on memorandums.

Mr. Friedman: Could I have a rather lengthy time for my memorandum, because we are having vacations up in my office. How long would you want, Counsel?

Mr. Barr: Oh, two weeks.

Mr. Friedman: Well, an additional two weeks would be all right.

The Court: Two weeks, two weeks, and one week?

Mr. Friedman: All right.

[Endorsed]: Filed March 6, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in the Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the Trustee.

Petition for Equitable Relief.

Notice of Motion to Strike.

Answer of W. E. Buell, Trustee to Petition.

Answer of Montague Water Conservation District to Petition.

Stipulation of the Parties.

Memorandum.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Appeal.

Order Extending Time to Docket Appeal.

Designation of Points Relied on Appeal.

Designation of Contents of Record on Appeal.

Order Extending Time to Docket Appeal.

Reporters Transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 14th day of March, 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 12502. United States Court of Appeals for the Ninth Circuit. W. E. Buell, Trustee for the Bond Holding Creditors of the Montague Water Conservation District, Appellant, vs. Montague Water Conservation District, Bankrupt and The City of Montague, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12502

United States
Court of Appeals
For the Ninth Circuit.

W. E. BUELL, Trustee for the Bond Holding Creditors
of the Montague Water Conservation District,
Appellant.

vs.

MONTAGUE WATER CONSERVATION DISTRICT,
Bankrupt, and THE CITY OF MONTAGUE,
Appellees.

Appellant's Opening Brief

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION.

FILED



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No. 12502

United States
Court of Appeals

For the Ninth Circuit.

W. E. BUELL, Trustee for the Bond Holding Creditors
of the Montague Water Conservation District,
Appellant.

vs.

MONTAGUE WATER CONSERVATION DISTRICT,
Bankrupt, and THE CITY OF MONTAGUE,
Appellees.

Appellant's Opening Brief

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION.

I

STATEMENT OF FACTS

In the year 1943, the bankrupt Montague Water Conservation District and its bondholders entered into a composition agreement which was approved by the District Court (See Transcript page 3). Certain properties owned by Appellee City of Montague were expressly excluded from the composition agreement. Levies were made upon these excluded properties by the District to pay outstanding bonds (See Transcript page 4). The City of Montague brought an action for equitable relief in the bankruptcy court (See Transcript pages 2-7). W. E. Buell, the Trustee heretofore appointed by the Court, appeared and moved to strike the petition upon the ground that the Court had no jurisdiction (See Transcript page 8), and answered the petition admitting all of the allegations except the allegation that no notice was given appellee of the original action, and in addition thereto set up the defense of laches.

The bankrupt made merely a nominal appearance and, except for the affirmative defense, raised the same issues as did the Trustee. The real property described lies outside of the city limits of the City of Montague.

II

STATEMENT OF APPELLANT'S POSITION
AND SPECIFICATION OF ERRORS

Appellant's position is two-fold. FIRST, that the Court had no jurisdiction to hear the petition; and SECOND, assuming, but not admitting, that the Court did have jurisdiction, that the City of Montague is not a proper party for the reason that in this instance it was a creditor not included within the composition agree-

ment and therefore any agreement within the composition was of no interest to it.

III ARGUMENT

A. The District Court had no jurisdiction to enjoin the levy of a tax. This matter was quite definitely decided by Judge Healy, Judges Garrecht and Haney concurring, in the case of *Mason vs. Merced Irrigation District*, 126 Fed. 2d. 920.

In the cited case this Court refused to reverse on appeal upon the ground that the order complained of did not limit the taxing power of the municipal subdivision, but in the opinion the Court inferred that had they found that the order did not interfere with the political or governmental powers, it would have reversed the order. In connection therewith it might be noted that the states are reluctant to even grant to their own courts the power to enjoin their levy. See *Crocker vs. Scott*, 149 Cal. 575; 87 P. 102.

A further issue not entirely in point but generally pertinent is the fact that the courts do not seem to recognize any implied equity power or authority of a Court setting in Bankruptcy. At least this is the impression that the writer gets from reading what cases are available to him cited in 8 Corpus Juris Secundum, and a good example of this line of cases is *In Re Kligerman* (D. C. Pa) 253 Fed. 778, in which the Referee in Bankruptcy recommended that the Court order a deed cancelled from the records of the Recorder of Deeds of a Pennsylvania County. The Court refused upon the ground that it had no jurisdiction as it has not even the slightest vestige of equitable powers. Following the

reading of the Kligerman case, it would be difficult to comprehend how a District Court could cancel an assessment on a piece of property that is admittedly not even a part of the composition agreement when it is apparently the rule that the Court could not expunge a deed given fraudulently in a transaction which was an integral part of the bankruptcy proceeding.

B. The City of Montague is not a proper party.

It is well settled that any person or class of persons not included in a bankruptcy or a composition agreement are not bound by the composition proceeding. The property was admittedly omitted from the composition agreement (See Transcript page 14, 31), this property being left entirely out of the agreement is not a part of the petition. See *Rittenoure vs. City of Edinburg*, 159 Fed. 2d 989. The property was certainly a proper subject of taxation. See *San Francisco vs. San Mateo*, 17 Cal. 2d 814, 112 P. 2d, 595. Art. XIII, Sec. 1, California Constitution.

In addition, the Appellee's position is fatally defective in that it has failed to allege or prove that it had paid or offered to pay any taxes due, and this of course is a prerequisite to bringing an action to set aside an assessment. See *Imperial Land Company vs. Imperial Irrigation District* 173 Cal. 660; 161 Pac. 113.

The Appellee is apparently making no contention that the District did not have power to levy these taxes but for the record they authorized so to do. See Section 25535 of the Water Code of the State of California.

At the very best, the Appellee, if it were a beneficiary at all, and it is submitted that Appellee failed to show

where they came into the composition agreement or were benefitted by it, the Appellee would be no more than a mere incidental beneficiary and therefore would have no standing in court to enforce the terms of the composition agreement. See *Mottashed vs. Central & Pacific Improvement Corp.* 47 P 2d 525.

IV

CONCLUSION

It is clear that the Court had no jurisdiction, and even if it did have jurisdiction, Appellee was not a proper party.

Dated: Yreka, California, January 10, 1951.

Respectfully submitted,

BARR AND HAMMOND,
Warrens Building
YREKA, CALIFORNIA

Attorneys for Appellant

No. 12,502

IN THE

United States Court of Appeals
For the Ninth Circuit

W. E. BUELL, Trustee for the Bond
Holding Creditors of the Montague
Water Conservation District,

Appellant,

VS.

MONTAGUE WATER CONSERVATION DIS-
TRICT, Bankrupt, and THE CITY OF
MONTAGUE,

Appellees.

BRIEF FOR APPELLEE.

SAMUEL R. FRIEDMAN,
Warrens Building, Yreka, California,
Attorney for Appellee.

FILED

MAY 19 1951

PAUL P. O'BRIEN,

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Appellees.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

In addition to the facts recited in Appellant's Opening Brief (page 2), it may be stated that the property in question was considered in the execution of the composition agreement and expressly excluded from the schedules attached thereto. (Transcript page 14.) The District Court, pursuant to said agreement, made its order as to the proper notice to be given all landowners in the District. All properties in the District which were to be assessed were set forth, and

those properties not to be assessed were expressly omitted from the schedules attached to the agreement, as was the property in question. Some three years after the execution, approval and confirmation of said agreement, without any permission or approval of the District Court, an assessment was levied against the property in question for the sole purpose of discharging the bonded indebtedness, the subject of the composition agreement. The City of Montague brought a petition for equitable relief and for interpretation of the composition agreement, as a landowner within the District and affected by said agreement.

STATEMENT OF APPELLEE'S POSITION.

Appellee takes the position that, as a landowner within the District, and according to the notice required to be given, and having been expressly excluded from the schedule to said composition agreement, it was a party contemplated within the agreement and was intended to rely thereon, since said composition agreement affected all property within the bankrupt District.

That the District Court had jurisdiction to interpret the composition agreement which it confirmed in the reorganization proceedings taken before it, as affecting all landowners within the bankrupt District.

That the evidence and Findings support the judgment of the District Court.

ARGUMENT.

The Designation of Points Relied upon on Appeal filed by Appellant recites the following points:

a. That the Court has no jurisdiction to hear the petition of the Appellee of the Town of Montague.

b. That the Court erred by law in finding that the said Town of Montague was injured by the proposed action of bankrupt of the Montague Water Conservation District.

c. That the Findings do not support the judgment. (See Transcript page 25.)

In Appellant's Opening Brief he has raised additional points not heretofore adjudicated nor specified in his Designation of Points Relied upon on Appeal, to-wit: 1. That the City of Montague is not a proper party; 2. That the District Court had no jurisdiction to enjoin the levy of a tax. It would appear that these two points are before this Court for the first time. With respect to the latter point, Appellant has cited a line of cases in support of his contention that the District Court had no jurisdiction to enjoin the levy of a tax. These cases deal with general taxation levies. There is no issue with respect to the payment of general taxes levied by the bankrupt District. Such taxes have always been paid and are currently paid by the City of Montague. The cases cited by Appellant in Appellant's Opening Brief at page 3 are not in point. The only levy by the bankrupt District which is involved in the case at bar, is the levy made against the Airport Property owned

by the City of Montague for the express purpose of discharging the bonded indebtedness, the subject of the composition agreement, which levy the District purported to make long after the composition agreement was accepted and confirmed by the District Court and contrary to the terms thereof.

The case cited by Appellant on page 4 of Appellant's Opening Brief in support of the contention that there is no proof that Appellant first paid the taxes due and which is a prerequisite to bringing an action to set aside an assessment, is definitely not in point and tends to confuse the issue involved. The case so cited deals with general taxation, which is not involved in the case at bar.

Appellant further raises the new point that the City of Montague is not a proper party. The case cited by Appellant is not in point. The composition agreement affected and intended to affect all the landowners in the bankrupt District. The parcels of land expressly excluded, as was the case respecting the Airport property, were just as much a part of and affected by the composition agreement, as were the properties expressly included in said agreement. The composition agreement was offered and accepted by the creditors with the intent that all landowners within the District were to rely thereon as affecting their respective property within said District. Appellant has admitted and as appears by stipulation (Transcript page 14) that in the preparation and final execution of the composition agreement, the property in question was

considered and was expressly omitted and excluded from the schedule to said agreement. The City of Montague relied thereon. In further support of the point that the City of Montague is a proper party, we call the Court's attention to the Notice of Hearing Upon Plan of Composition, which was published as ordered by the District Court, wherein it states in part, "Creditors of the District and the landowners therein are hereby referred to the petition and plan of composition attached thereto, now on file with the Clerk of the above-entitled Court for details and particulars of the proposed plan of composition and the proceedings taken and to be taken therein." It is quite apparent that Appellant's position is without merit.

According to the records and files in the above matter a plan of composition was duly and regularly filed with the District Court under the provisions of Sections 81-84 of the Bankruptcy Act was accepted by Appellant on behalf of all the creditors and, on petition duly filed before the District Court, was, by said Court, confirmed. A composition is a settlement of the bankrupt with his creditors, in a measure superseding and originates in a voluntary offer by the bankrupt, and results from voluntary acceptance by his creditors. The respective rights of the bankrupt and the creditors are fixed by the terms of the offer, and upon confirmation of the composition they get what they bargained for and no more. (*Schram v. Perkins*, 38 F. Supp. 404; *Myers v. International Trust Co.*, 273 U.S. 380, 383; 47 S. Ct. 372, 71 L. Ed. 692.)

A composition with creditors partakes of the nature of a contract, in a measure superseding and outside a bankruptcy proceeding, and is an offer and acceptance whereby the respective rights of a bankrupt and creditors are fixed by the terms of the offer on its confirmation. (*Barker v. Ackers*, 29 Cal. App. (2d) 162, 84 P. (2d) 264.)

In the case at bar, the plan of composition provided, among other things, that the bondholders through their trustee, W. E. Buell "will accept from any individual land owner in the district in full settlement of the liability of such land for the payment of all the outstanding bonds and coupons of the District, whether due or to become due, the amount set forth in Exhibit 'B' opposite the description of such land in the column marked 'Cash Price' * * * and give full releases therefor * * *" A provision was also made for term price. (See Composition Agreement Paragraph I.) All the property in the District was considered and the property which was to be assessed was set forth on the schedule which was a part of the composition agreement and the amounts allocated set forth. (See Exhibit B Composition Agreement.) The composition agreement approved by the District Court and the property therein set forth, was intended to satisfy the full bonded indebtedness. In the plan of composition the bankrupt District offered to make the levies as shown on the schedules attached to the agreement in liquidation of the entire bonded indebtedness, which the creditors accepted and which was confirmed by the District

Court. The creditors are entitled to no more. Some three years after the confirmation of the composition agreement, W. E. Buell, as trustee for the bondholders, induced the bankrupt to further make an arbitrary assessment against the property in question for the sole purpose of discharging the bonded indebtedness, the subject of the composition agreement. If any assessment was to be made against the property in question the property should have been listed in the Composition Agreement and a sum allocated against the property. Appellee would then have received the notice which was ordered by the District Court and would have had an opportunity to redeem its property similar to other property owners within the District. As a jurisdictional fact all parties in the District whose property was listed in the agreement were notified by proper notice ordered by the District Court. The notice ordered was directed to all property owners in the District listed in the composition agreement schedules, which notice was to be by publication and personal service. The City of Montague did not receive such notice, as supported by the pleadings and evidence. Had the property in question been set forth on the schedule to the composition agreement and an amount allocated against it, Appellee would have had three elective rights, as follows: 1. Paid the cash price and received full releases therefor; 2. Taken advantage of the term price; 3. Objected to the amount of, or any assessment, or amount allocated against the property. The intentional acts of Appellant and the representations made by him, lulled Appellee into a state of inaction.

The Composition Agreement, being in the nature of a contract (*In re Adler*, 103 Fed. 444; *Myers v. International Trust Co.*, 273 U.S. 380, 383; *Hansen et al. v. Wingren*, 121 Fed. (2d) 1011, 1012) between the District and all creditors and between the creditors themselves, the parties to the composition should be governed by the rules usual in contract matters. Section 1962 (3) of the California Code of Civil Procedure provides a conclusive presumption, as follows:

“Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.”

Appellant is entitled to nothing further than it agreed to accept by the composition agreement. At this time practically all of the properties in the District have been released by payment of the amounts allocated and set opposite the respective properties. Appellant has no authority or right to demand any further payments than afforded by said composition agreement.

Appellant further raises the point that a Court sitting in Bankruptcy has no equitable powers, but admits the point is not in issue. Not only is the point not in issue, but such contention is not supported by the case cited nor by the general rule. Appellee is unable to find the statement of Appellant on page three of Appellant's Opening Brief that such court has not even the slightest vestige of equitable powers. Bank-

ruptcy Courts are courts of equity without terms, and a corporation is open to re-examination until the closing of the proceedings. (*National City Bank of N. Y. v. O'Connell*, 155 F. (2d) 329.) The Chandler Act has for its purpose the rehabilitation of distressed business organizations through reorganization, and its effect is to place every phase of the debtor's business under the supervision of the Court which had exclusive jurisdiction over the debtor and its property during the reorganization period. (*In re Quick Charge*, 69 F. Supp. 961.) A proceeding for reorganization of a corporation is one in equity. (*In re Peterson's Motor Exp.*, 84 F. Supp. 230.) In voluntary reorganization proceedings, where debtor owned three oil and gas leases and was engaged in the business of drilling oil, the bankruptcy court had jurisdiction to pass upon the rights of the holder of overriding royalty interest and to direct cancellation of overriding royalty interests as part of proposed plan. (*In re Engineers Oil Properties Corp.*, 72 F. Supp. 989.) There is, therefore, no question but that the District Court had the right to interpret the composition agreement which was confirmed by said court as to the rights of all the property owners within the District, all of whom were affected by the said agreement, whether set forth on the schedules attached thereto, or expressly excluded therefrom.

It is further of interest that although the property in question was referred to as the Airport Property, the evidence is conclusive that a greater portion thereof has always been held and is presently being

held for the purpose of a sewage disposal area, and that another portion thereof is and has been for some years been held and used as a city dump ground.

In summarization, to permit the bankrupt District, at the instance of Appellant, to assess the property in question would be in direct violation of and in excess of the rights provided for and agreed upon in said composition agreement, and upon which agreement all property owners within the District were to rely. Appellee further contends it was denied its right to compromise any bonded indebtedness as were other property owners within the District; that the bondholders would receive property not contemplated or agreed upon in the composition agreement; that the Appellee would be deprived of its property without due process of law, in view of the notice provided being jurisdictional.

CONCLUSION.

The judgment estopping the bankrupt District from assessing the property in question for the sole purpose of discharging the bonded indebtedness, long after the acceptance of the composition agreement by the creditors and confirmation by the District Court, should be sustained. The District Court had jurisdiction to interpret the composition agreement by the creditors and confirmation by the District Court should be sustained. The District Court had jurisdiction to interpret the composition agreement with respect to the rights afforded the bankrupt and the

creditors. Appellee is a proper party in that the composition agreement intended to and did affect all property owners within the District and each of such owners was intended to rely upon said agreement. The contention of Appellant with respect to the enjoining of the levy of a tax, is not well taken and tends to confuse the issue, there being no question as to the levy of the general taxes by the District, which taxes have always been paid by Appellant. The judgment of the District Court is just and equitable.

Dated, Yreka, California,
March 12, 1951.

SAMUEL R. FRIEDMAN,
Attorney for Appellee.



